

Volume 2

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Laurel Beeler, Magistrate Judge

GROUSE RIVER OUTFITTERS, LTD.,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 16-02954 LB
)	
ORACLE CORPORATION,)	
)	
Defendant.)	
)	

San Francisco, California
Wednesday, July 10, 2019

TRANSCRIPT OF PROCEEDINGS

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1 **I N D E X**

2 Wednesday, July 10, 2019 - Volume 2

3 **PLAINTIFF'S WITNESSES**

4 **FALLIS, GLENN (RECALLED)**

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PROCEEDINGS1 Wednesday - July 10, 2019

8:30 a.m.

P R O C E E D I N G S

3 ---000---

4 (Proceedings were heard out of presence of the jury:)

5 **THE COURT:** We can go on the record.6 We have a juror problem this morning. Juror Number 2
7 apparently overslept and is on his way.8 **MS. XI:** Okay.9 **MR. KIEVE:** How much did he oversleep?10 **THE COURT:** Well, Elaine said we're not exactly sure
11 if the ETA arrival of an hour was an hour late, like 9:30, or
12 whether it's an hour from now. I think -- well, it must be --
13 or it was an hour earlier.14 So Elaine will try to get a little bit more information.
15 But the cafeteria does a wonderful breakfast with eggs. I
16 mean, honestly, it's not quite the farm-fresh eggs but --17 **MR. SUSMAN:** It's a lot better than Mr. Kieve's house.18 **THE COURT:** Is it really?19 **MR. SUSMAN:** I can tell you that.20 **THE COURT:** Well, then I would write a negative review
21 on Yelp if I were you.22 So, okay. So I'm sorry about that. So Elaine will give
23 you a little bit more information. I think we can at least
24 bank on a half hour and possibly not till 9:30. And I guess
25 what we'll do is we'll just go later today.

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Do you want to tell the jury?

I mean, maybe we'll go till 2:00 just to split the difference.

Hey, Mr. Gattey, you missed the big news. The case settled.

(Laughter)

THE COURT: Ha-ha. Right? No.

MR. KIEVE: For a lot of money.

9 **THE COURT:** So Juror Number 2 is late, possibly by an
10 hour. So why don't we reconvene then.

When Elaine gets more information, she'll let you know.

12 She'll update you in 30 minutes. And if it's another
13 30 minutes, then we'll apologize to the jury and maybe try to
14 go a half hour later.

MR. KIEVE: How will she update us? Just e-mail?

THE COURT: Well, she's here in the courtroom.

Right?

THE CLERK: Yes.

19 **THE COURT:** She's IM-ing the Jury Office to see if she
20 can get a bit more information.

MR. KIEVE: What time would you like us back?

THE COURT: Well, 9 o'clock. I would stay close.

(Recess taken at 8:32 a.m.)

(Proceedings resumed at 9:29 a.m.)

(Proceedings were heard out of the presence of the jury:)

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1 **THE COURT:** We're on the record.

2 **MS. RAY:** Okay. Great.

3 So, now, Grouse River disclosed to us last night that they
4 intend to use three of the video demonstratives.

5 **THE COURT:** Okay.

6 **MS. RAY:** Two of the videos are the ones that were
7 submitted to you with our motion in limine --

8 **THE COURT:** Yes.

9 **MS. RAY:** -- that you already ruled on.

10 But in that pretrial order, you held that those videos
11 could be used as a demonstrative if Mr. Fallis laid the proper
12 foundation.

13 **THE COURT:** Yes.

14 **MS. RAY:** So assuming that he does --

15 **THE COURT:** Yes.

16 **MS. RAY:** -- and you are satisfied --

17 **THE COURT:** And fact, fact, fact, fact, fact, fact. I
18 mean, really, let's stick to the facts, foundations as fact.

19 **MS. RAY:** We will challenge those --

20 **THE COURT:** That's totally --

21 (Simultaneous speaking; court reporter interrupts.)

22 **MS. RAY:** We'll deal with those when they come up.

23 **THE COURT:** Perfect.

24 **MS. RAY:** The third video --

25 **THE COURT:** Yes.

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1 **MS. RAY:** -- TX232, is different.

2 **THE COURT:** Okay.

3 **MS. RAY:** If you remember, this is a video that
4 appeared for the first time on Grouse River's exhibit list and
5 was not produced to us at any time.

6 It wasn't produced during discovery. So we were not able
7 to address it in our motion in limine. And Your Honor did not
8 have the ability to consider it and to consider whether the
9 prejudice of the video outweighs its probative value.

10 In the pretrial order, you specifically withheld judgment
11 as to whether these undisclosed videos should be excluded under
12 403, and you said, I think -- I'm reading from Docket 292 --
13 you could not evaluate whether the additional videos are
14 unfairly prejudicial because you just didn't have them.

15 **THE COURT:** Right.

16 **MS. RAY:** So this video is different because --

17 **THE COURT:** Okay.

18 **MS. RAY:** Let me be clear. The ones that we are not
19 objecting to were created when the business was still running.

20 This video was created in August 2017, after they were out
21 of business, a year after the litigation was filed, when they
22 did not have any employees, when they did not have an
23 e-commerce department. It was created in a way that could not
24 represent -- it could not be substantially similar to the
25 environment they were going to report because there were no

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1 customers at that time; there was no live business. It's a
2 different beast altogether than the ones that were created when
3 they were still an operative business.

4 So that is a real issue. It is not a demonstrative
5 because it is not substantially similar to what it purports to
6 be representing.

7 **THE COURT:** Understood. Yeah, I understand the
8 argument. Okay.

9 So what's your answer to that, Mr. Kieve?

10 **MR. KIEVE:** It's a demonstrative of the state of play
11 at the time.

12 **THE COURT:** Except for the state of play at the
13 time --

14 **MR. SUSMAN:** Not at the time.

15 **THE COURT:** Exactly. It's got to be at the time the
16 business was up and running.

17 No, I understand.

18 **MR. SUSMAN:** It can be as if he made it this weekend
19 to demonstrate something that happened long ago. It's not
20 being introduced --

21 **THE COURT:** Completely understand.

22 Okay. So here's what happens. So you know this. So
23 foundation is if he says, "I did this at this period of time in
24 August 2017, but it is substantially the same or virtually
25 identical," or whatever it is, "to the events."

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1 And you're saying that can't possibly be true. But if he
2 testifies to it under oath, then the challenges go to weight
3 and not admissibility. And that's fair. It's super fair
4 cross-examination.

5 **MS. RAY:** But it is also still available to the Court
6 to say that this is unduly prejudicial because it is
7 representing to be something that it cannot be.

8 **THE COURT:** Well, I appreciate -- see, the problem is,
9 if that were demonstrably true, that I could forensically say,
10 based on expert analysis, for example, that it could not
11 possibly be that the video created in August, I'm just going to
12 say, 2017 --

13 **MS. RAY:** But as a matter of fact.

14 **THE COURT:** As a matter of fact.

15 But he's going to testify. If he testifies as a matter of
16 fact that it is true, then he's laid -- I mean --

17 **MS. RAY:** He cannot testify as a matter of fact that
18 he had employees maintaining the Grouse River website in the
19 same manner that he did when the business was still running.

20 **THE COURT:** But if he testifies that the
21 functionality, load time, and all the different things that you
22 brought up in your opening statement, that it is identical or
23 virtually identical, then that's a foundation.

24 It may not be true. He may be mistaken. And then I think
25 it's fair cross-examination.

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1 And I hear you. You may be -- one of the -- this is a
2 terrible thing to say, but one of the funny things about the
3 truth is it's elusive. When people testify that something is,
4 I have no way -- I can accept what you say, and I'm stuck with
5 the foundational facts that he puts in.

6 **MS. RAY:** I agree.

7 **THE COURT:** And I don't think I can kick it out on 403
8 grounds. 403 is a funny beast anyway.

9 And if someone says the functionality of this
10 demonstrative is exactly as it was at the time, and he says
11 that that's true, I don't think there's a lot that I can do
12 about it as a matter of evidentiary admissibility.

13 And I don't think that the 403 -- it's a year later;
14 therefore, necessarily, it must not be the same, despite his
15 testimony as to that fact -- I don't think that flies under 403
16 as unduly prejudicial. But I appreciate the argument.

17 **MS. RAY:** And I would also argue, though, that the
18 foundational facts are different. So he cannot set --

19 **THE COURT:** Well, he does not have the employees, but,
20 for example, I mean --

21 **MS. RAY:** They're a shut-down business.

22 **THE COURT:** No. I appreciate that.

23 **MS. RAY:** So that's not the same business. There are
24 no customers. No customer could experience in August 2017 what
25 he experienced in August 2017.

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1 **THE COURT:** Because there are no customers.

2 **MS. RAY:** There are no customers. There is no live --

3 **THE COURT:** Mr. Susman wants to say something.

4 **MR. SUSMAN:** I just want to say, let's focus on what
5 we're trying to do. It's a demonstrative.

6 He can say, "This is a demonstrative I made after my
7 business was already closed down to illustrate the problems we
8 were having."

9 **THE COURT:** Okay.

10 **MR. SUSMAN:** That's the way --

11 **THE COURT:** And is it helpful for your testimony?

12 Yes. It doesn't come in as an exhibit.

13 So I think that Mr. Susman's right, as a matter of
14 evidence.

15 And so, thank you. I appreciate it. As always, I
16 appreciate all of your arguments. They're always so very good.

17 Okay. All right. So we're good.

18 **MR. KIEVE:** I'm good.

19 **THE COURT:** Okay. So Elaine will get the jury.

20 **MR. KIEVE:** Your Honor, before the jury comes in, may
21 I just briefly set the stage, explain where we were yesterday
22 and where we are today?

23 **THE COURT:** Sure. You're welcome to pick up wherever
24 you want. I don't mind --

25 **MR. KIEVE:** No. But I just want to say, "If you

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1 recall, ladies and gentlemen, we were referring to" --

2 **THE COURT:** Oh, I see. You're asking whether you can
3 set the stage for the jury. That's fine. That's fine. Topic
4 sentences are fine. Please just stick to facts.

5 (Proceedings were heard in the presence of the jury:)

6 **THE COURT:** Good morning, everybody.

7 A few hiccups this morning, and then, of course, we had a
8 last-minute little technical thing that came up. And so
9 thank you for being here, and everyone may be seated.

10 And Mr. Kieve is going to recall Mr. Fallis.

11 **MR. KIEVE:** "Fallis."

12 **THE COURT:** Where is he?

13 **MR. KIEVE:** He's hiding.

14 **THE COURT:** There you are. Why don't you come on up
15 and take the stand, and you're still under oath.

16 (GLENN FALLIS steps forward to resume the stand.)

17 **THE COURT:** And Mr. Kieve is just going to set the
18 stage for you to remind you where we left off yesterday.

19 **MR. KIEVE:** Good morning, members of the jury. I
20 apologize. I apparently mumbled and did not speak up. I'm
21 trying to solve this today. And thank you for telling me that,
22 through the courtroom deputy.

23 **MR. SUSMAN:** Your Honor, could I -- would the jury
24 raise their hand if they can't hear any lawyer in the case?

25 **THE COURT:** Yes, just let us know.

MR. SUSMAN: Or if they can't see.

THE COURT: Exactly.

MR. KIEVE: Okay. Thank you very much.

Good morning. If you recall yesterday when we adjourned, we were looking at a chart that had green and yellow and orange that set out some requirements that Grouse River, Mr. Fallis had asked NetSuite to supply, and they had responded with a chart that said "native" to many of those.

I'm going to then take us to the next step after that.

And I just wanted to set the stage for that.

So thank you, Your Honor, for that.

THE COURT: Of course.

GLENN FALLIS,

called as a witness for the Plaintiff, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION (resumed)

BY MR. KIEVE:

Q. Following the exchange of the correspondence you had and the business specifications requirement, what happened next in the NetSuite relationship?

A. We received that document where we left off yesterday, the exhibit showing the requirements with the native responses on it there.

o. Did a meeting follow?

A. Yes, a meeting followed. It was scheduled to take place

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1 in Kelowna, close to our head office.

2 **Q.** Do you recall when that occurred?

3 **A.** Yes. It was in late November of 2013.

4 **Q.** Okay. Can you recall who was there from NetSuite?

5 **A.** Yes. Mr. Cole Waldron attended; a gentleman by the name
6 of Michael Weiss, who was a sales executive at NetSuite. There
7 was a gentleman by the name of Jeff Hoffmeister present, and a
8 couple of other individuals joined by phone.

9 Ryan Murphy was one of the individuals on the phone. And
10 Owen Fayle, who had done some of our discussions on the phone
11 regarding e-commerce prior, attended remotely as well.

12 **Q.** And these were from NetSuite?

13 **A.** Correct. Yes.

14 **Q.** Who attended from Grouse River?

15 **A.** A representative from nearly every business unit was
16 there. We had an accounting representative, Stacie Coyle; we
17 had myself; Maciek Wronski, who handled our purchasing
18 department; Amber Coyle, who handled our marketing department.
19 We had Troy Hill, who had helped assemble some of the
20 requirements for me.

21 I think I've got everybody, but I might have missed --

22 **Q.** Okay. After the meeting, did you receive an e-mail from
23 Mr. Cole?

24 **A.** Yes, I did. He followed up with an e-mail and attached
25 the slides from the presentation that NetSuite had delivered to

1 us.

2 **Q.** Okay. Could we please take a look at Trial Exhibit
3 Number 142.

4 Can you identify this for the Court.

5 **A.** Yes. This is the e-mail that Mr. Waldron sent to myself
6 and other members of our team following that meeting in late
7 November.

8 **Q.** Okay. He writes -- I'm not going to focus on the top of
9 it. Let's see if we can focus on the bottom part of it.

10 He writes:

11 "NetSuite is creating a new software category" --

12 Let's wait till we get it up.

13 Will you give us the bottom part? No, I want the bottom
14 part of this, please. Give us -- this is not it.

15 No, it is. Turn to the next page, please.

16 I'll tell you what. Let's just go on.

17 Did you -- he attaches a document to this; correct?

18 **A.** Correct.

19 **Q.** And what is that document?

20 **A.** That document is the compilation of slides from our
21 presentation that we saw when NetSuite was on-site with us.

22 **Q.** Okay. Could we turn to those, please.

23 Is this the set of slides?

24 **A.** Yes.

25 **Q.** Okay. Let's turn to page 4 of the slide. I'm missing my

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1 pagination here. I apologize. See if you can get -- never
2 mind.

3 Did NetSuite demonstrate -- I apologize, Your Honor.
4 There seems to be a technical problem.

5 **THE COURT:** Don't worry about it. We'll wait for the
6 technology to catch up. You can go ask if you want.

7 **MR. KIEVE:** What I'm looking for is page 4 of this
8 document. Can you turn the next page, and then the next page.
9 I've got a pagination problem. Can we turn to the next page
10 and then we'll be able to catch up.

11 **THE COURT:** No worries.

12 **MR. KIEVE:** That's not it.

13 **THE COURT:** You want to walk back and show him?

14 **MS. RAY:** I think this is a different exhibit than --

15 **THE COURT:** Than the one he's talking about?

16 Why don't you go back and show him your exhibit, your hard
17 copy, and then see if you can pull that up.

18 **MS. RAY:** That's not the right Bates number for 142,
19 the document that you should be introducing into evidence. You
20 have a different one up here.

21 **THE COURT:** You can take the hard copy --

22 **MR. KIEVE:** I can do that.

23 **THE COURT:** -- if you have it, and maybe that will
24 help your tech person bring it up.

25 And if not, we can always get an ELMO in here too as a

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1 backup.

2 **MR. KIEVE:** Thank you very much, Your Honor.

3 **THE COURT:** But you need to tell Elaine that, and then
4 we need to see if we can arrange to do that. We probably can,
5 but probably not instantly.

6 **BY MR. KIEVE:**

7 **Q.** Mr. Fallis, you have 142 in front of you?

8 **THE COURT:** Presumably, the binder copy is fine. So
9 you can look at your binder, 142, and --

10 **MS. RAY:** They didn't provide us a binder.

11 **THE COURT:** Okay.

12 **MS. RAY:** We had to make our own binder.

13 **THE COURT:** Okay. All right.

14 **MS. RAY:** So we have our version of it.

15 **MR. KIEVE:** I'm going to just try and do it without
16 the exhibit, if that will work.

17 **THE COURT:** Mr. Susman is getting you a copy of 142.

18 Thank you.

19 **MR. KIEVE:** Let me just ask some questions, if I can.
20 I think we can move this right along.

21 **BY MR. KIEVE:**

22 **Q.** Did NetSuite demonstrate NetSuite's responsive Web design
23 functionality in this meeting?

24 **A.** Yes, they did.

25 **Q.** Okay. And did they also demonstrate NetSuite's advanced

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1 inventory reporting functionality in this meeting?

2 **A.** Yes, they did.

3 **Q.** What did they tell you about that?

4 **A.** They told us that NetSuite would be able to support the
5 ordering that we wanted to do from multiple locations, and to
6 distribute from a single warehouse.

7 **Q.** Okay. Did they demonstrate NetSuite's advanced marketing
8 functionality?

9 **A.** Yes, we discussed that.

10 **Q.** Okay. Did the NetSuite team tell Grouse River anything
11 about the speed of the NetSuite website platform?

12 **A.** Yes. They specifically represented that the server
13 response time would be less than half a second.

14 **Q.** Give me a moment. I want to find one thing.

15 Oh, did they reference anything about shopping online and
16 picking up in store?

17 **A.** Yes. They indicated that that would be a feature on the
18 point-of-sale system.

19 **Q.** Okay. Did they reference credit, debit, and gift card
20 processing?

21 **A.** Yes, they did. We discussed that being integrated across
22 our entire platform.

23 **Q.** Okay. Let me find page 33, I hope. Yes, page 33, please.
24 This depicts Williams-Sonoma.

25 What did you understand this to represent to you?

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1 A. This shows Williams-Sonoma as one of the --

2 MS. RAY: That -- that --

3 THE WITNESS: -- users of the NetSuite platform as a
4 customer.

5 BY MR. KIEVE:

6 Q. Did they represent that that --

7 THE COURT: Hang on a second.

8 Ms. Ray?

9 MS. RAY: I'm sorry. We're just really confused.

10 I can see this page. It just -- I don't want to -- it
11 just has a different page number for us. So I'm just not sure,
12 again, what document we're looking at.

13 But, I mean, I can see the page. I do see it. So I don't
14 want to object that it doesn't exist. I'm just worried we're
15 working off of two different documents --

16 THE COURT: Right now, just for tidiness sake, you're
17 going to have to true-up the exhibits at the end where there
18 will be one set of exhibits. This is Exhibit 142. You have
19 the separate binder. We have the large binder.

20 Sorry. The interplay of technology and paper is just
21 brutal.

22 So at the end of the day, you will have hard copies of the
23 exhibits that go back. Some of them may go back to you, the
24 jury, on a computer. We'll work that out. So you can access
25 them on the jury laptop, or they may go back in binder format.

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1 And what I'm telling the lawyers is, this is Exhibit 142.
2 And the binder will have the correct exhibit. And the lawyers
3 will be charged at the end of the case, before the exhibits are
4 delivered to you, to make sure it's tidy and perfect.

5 And so with that, Mr. Kieve, you may proceed.

6 **MR. KIEVE:** Thank you. I think I've caught up to
7 where I'm supposed to be.

8 **THE COURT:** Okay.

9 **MR. KIEVE:** Thank you.

10 And thank you, jury, for your indulgence.

11 **BY MR. KIEVE:**

12 **Q.** Was this part of the presentation that the Grouse --
13 excuse me -- the NetSuite team made to you in Kelowna in
14 November of 2013?

15 **A.** Yes, this slide was part of that presentation.

16 **Q.** And what did they tell you when they showed this slide?

17 **A.** They were showing us that Williams-Sonoma was using the
18 NetSuite SuiteCommerce product, and they provided a
19 demonstration of the Williams-Sonoma website as part of that
20 demonstration, showing us functionality from that website.

21 **Q.** Is this the same screen that Ms. Ray showed the jury in
22 her opening statement?

23 **A.** I don't recall specifically whether that slide was on her
24 opening statement.

25 **Q.** Okay. Did you later learn something about whether or not

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1 this was an accurate representation?

2 **A.** I did. In a project management document that was attached
3 to a later e-mail that we received, there was a comment from
4 NetSuite project management indicating that the Williams-Sonoma
5 website had not been created on the NetSuite platform and
6 should not be shown for any purposes.

7 **Q.** Did Mr. Cole Waldron follow up the meeting with another
8 e-mail?

9 **A.** Yes. There was numerous e-mails following that meeting.

10 **Q.** Could we please take a look at Exhibit 169. Can you blow
11 up the top part, please.

12 You write:

13 "Hi, all. As a follow-up from our visit last week, I
14 have included the outstanding questions and answers below.
15 I have also attached a data sheet that describes our data
16 center security process and another data sheet with our
17 gift card specifications."

18 Is this the e-mail you received from him?

19 **A.** Yes, we received this e-mail.

20 **Q.** Okay. The first three pages of this PDF are the e-mail.
21 The last three pages are actually a clearer version. And I'd
22 ask to turn to the sixth page of this document that is headed
23 "Outstanding Questions from Tuesday, November 26." Can we
24 please have that. At the bottom of the page, can we blow that
25 up.

1 It says:

2 "Credit card Chip and PIN support? Supported with
3 your current hardware. A single mobile solution for
4 portable EMV doesn't exist today. The salesperson would
5 need to carry the tablet as well as an EMV unit."

6 What does this mean to you?

7 **A.** We had discussed two ways to check out customers in the
8 future of our business during that sales presentation in
9 November.

10 One way was just through our standard point-of-sale that
11 would exist as a till, or a checkout as you would understand
12 it, in any retail store.

13 The other way was to look to the future and understand
14 that we would likely want to be mobile throughout our store and
15 to check customers out wherever they might be shopping, through
16 a portable device like a tablet.

17 What Cole is representing here is that the chip and PIN
18 support that's required for credit card processing, as we had
19 discussed in Canada, was supported with our current hardware on
20 the tills, but that if we wanted to evolve to the mobile
21 point-of-sale system, that would be two different devices, both
22 a tablet and a portable EMV unit.

23 **Q.** Did you subsequently learn that EMV or chip technology was
24 not available in Canada -- excuse me --

25 **A.** We subsequently learned --

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1 **Q.** -- on the NetSuite platform?

2 **A.** We subsequently learned that chip and PIN technology could
3 not be supported at all with the NetSuite platform.

4 **Q.** Okay. Let's turn to the next page of this exhibit,
5 page 7. Would you blow that up, please, for the jury.

6 This reads:

7 "Support for serialized transactions. I believe the
8 primary use case here is firearms."

9 Would you please explain that?

10 **A.** Yes. So as we discussed yesterday, we carry serialized
11 items, like firearms and other high-end items, that would have
12 serial numbers. Those are required for tracking purposes in
13 Canada as far as legislation on the firearms.

14 What Cole is saying here is that they could leverage
15 NetSuite's serialized inventory that they had represented as
16 pre-existing, or native, from receipt to sale; and if
17 validation of that was required, they would use the NetSuite
18 back end. If a serial number validation number isn't a
19 requirement, then we could use the NetSuite point-of-sale
20 system for the transaction to enter the serial number at the
21 point of sale.

22 **Q.** Would you have contracted with NetSuite if it did not have
23 that functionality?

24 **A.** Absolutely not. This is a primary function we required.

25 **Q.** Ms. Ray told the jury in her opening statement that

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1 NetSuite provided automatic upgrades twice a year and that
2 Mr. Swan would testify about this.

3 Did you have any discussions with the NetSuite sales team
4 at the November 26, 2013, meeting about upgrades to the
5 NetSuite platform?

6 **A.** We did, yes.

7 **Q.** What did they say?

8 **A.** They represented that the updates would occur twice a
9 year, that they would occur automatically, that any
10 customizations we had to the software would be seamless in
11 terms of the upgrade, and that all of the resources to do the
12 updates were NetSuite's responsibility.

13 **Q.** When Grouse River went live with the NetSuite system, did
14 it do this?

15 **A.** No, it did not.

16 **Q.** What happened?

17 **A.** The updates would break our connection to the point of
18 sale, completely disabling our point of sale. They would break
19 our online checkout. They would break the customizations that
20 we had done to the e-commerce site. There was numerous issues
21 at every upgrade.

22 **Q.** What impact did that have on your business?

23 **A.** Everything from customers not being able to transact, to
24 our staff not knowing what was going on. It was disastrous.

25 **Q.** Did this occur automatically each year?

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1 **A.** No. It occurred twice a year.

2 **Q.** Do you recall a follow-up telephonic meeting around
3 January 6, 2014, with NetSuite?

4 **A.** Yes.

5 **Q.** Can you recall who was on that call?

6 **A.** It was myself, Cole Waldron, I believe. I'm not sure who
7 else was there.

8 **Q.** Okay. What did you discuss, if you can recall?

9 **A.** I recall specifically diving into some e-commerce
10 requirements post that discussion, and discussing some more
11 aspects of the responsive sales design of the e-commerce
12 website.

13 **Q.** Was Branden Jenkins on the phone?

14 **A.** Yes. He was there to discuss the point-of-sale
15 requirements, I believe.

16 **Q.** Who is or was -- who is, was at the time -- what was his
17 position with NetSuite?

18 **A.** Branden Jenkins was somebody who was in charge, I believe,
19 of the overall point-of-sale system at NetSuite.

20 **Q.** Okay. Did Mr. Jenkins follow up that meeting with an
21 e-mail?

22 **A.** He did. He sent over a document outlining the current
23 point of sale, as well as some follow-up communication from the
24 meeting.

25 **Q.** Could we please take a look at Exhibit 356.

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1 Is this the e-mail he sent you?

2 **A.** Yes, it looks to be.

3 **Q.** And could we blow up the yellow part.

4 "I have attached the integration documents for
5 NS/POS."

6 Could we then go to the integration documents which are
7 attached at page 5. Can we blow that up for the jury.

8 What is this referring to?

9 **A.** This is an overview of the functionality of the NetSuite
10 point-of-sale system as represented in that document. As you
11 can see, there's some highlighted items tying directly to the
12 native requirements that we had.

13 **Q.** Which of these were must-haves in your documents --
14 business specifications requirement document?

15 **A.** Retail transactions, the ability to handle matrix items,
16 the gift cards integration.

17 **Q.** Could we turn to the next page.

18 What about taxation?

19 **A.** Sorry. I wasn't finished.

20 **Q.** I'm sorry.

21 **A.** The return/exchange validation, integrated payment
22 processing, promotions, and taxation.

23 **Q.** Okay. Could we turn the page to page 6. Page 6? Okay.

24 It has a reference there to -- and can we blow that up
25 too, please.

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1 It has a reference there to an end-to-end multi-channel
2 retail management suite that helps retailers transform and
3 better manage their business while delivering enhanced customer
4 service.

5 What is that referring to?

6 A. In essence, it's the idea that the entire system is
7 integrated; that it ties to a single back end.

8 And that is exactly what we were looking for, as you
9 recall from the top of our requirements document.

10 Q. Okay. Attached to this -- let me -- following this, was
11 there a technical specifications document?

12 A. Yes. This is, I believe, the prelude to a technical
13 specifications document.

14 Q. Okay. And did you read that?

15 A. Not in detail. It's coding, essentially, in the back of
16 it.

17 Q. Did you understand that it had any different functions
18 than was represented to you in the first part of this document?

19 A. No, I did not.

20 Q. Okay. Do you recall a demonstration by NetSuite on
21 January 8th, 2014?

22 A. Yes, I do.

23 Q. Tell us about that.

24 A. We went into additional detail on the e-commerce platform
25 again, and reviewed the integration that was involved with that

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1 platform.

2 **Q.** Did you discuss Canadian shipping and taxing requirements?

3 **A.** We did. We were specifically investigating the
4 integration with Canada Post, which is our required carrier for
5 a number of our products, and the requirement for that to be
6 seamless as part of the integration with the platform.

7 **Q.** Following January 8, 2014, did you have any follow-up
8 meetings or telephone calls with the NetSuite people?

9 **A.** We did, yes.

10 **Q.** What was the first one you can recall?

11 **A.** Well, we also set up a meeting regarding an integration
12 partner named OzLINK to handle some of our warehouse
13 integration. This was another partner that NetSuite suggested
14 was required to meet our full set of requirements.

15 **Q.** In any of those calls, did Mr. Waldron or anybody else
16 suggest that he wanted to introduce you to higher-ups within
17 NetSuite?

18 **A.** Yes. There were some calls where we had been introduced
19 to other representatives from NetSuite.

20 **Q.** Why did that happen, or did he tell you why?

21 **A.** The essence was that our account was something that was
22 being strategically pursued to expand into both the Canadian
23 market as well as the retail vertical as a whole.

24 **Q.** Were you introduced to a fellow by the name of
25 Gary Specter?

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1 **A.** I was, yes.

2 **Q.** And who is he?

3 **A.** He was their vice president of retail sales.

4 **Q.** Were you introduced to someone by the name of Satish Iyer?

5 **A.** I was, yes.

6 **Q.** And what was his position?

7 **A.** Satish was a head professional services individual at
8 NetSuite.

9 **Q.** Do you recall a telephone conference on March 13, 2014?

10 **A.** Yes, I do.

11 **Q.** Can you tell us about it.

12 **A.** Yes. We started diving into the nature of the overall
13 engagement and what the contracts might look like.

14 **Q.** Okay. Did you have a follow-up exchange with Gary
15 Specter, the vice president?

16 **A.** I did, yes.

17 **Q.** Okay. How did that occur?

18 **A.** Mr. Specter and I discussed what was required in the
19 platform, and he represented full confidence in what his sales
20 team had previously represented, that the platform could meet
21 our requirements.

22 **Q.** Could we take a look at TX364, please. Could you blow
23 that up, please.

24 Is this the e-mail that you had -- exchange that you had
25 with him?

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1 **A.** Yes, it is.

2 **Q.** Okay. What are you talking about here?

3 **A.** I'll read it, to start.

4 "I also know that both the upheaval a major software
5 change represents to our business, as well as the somewhat
6 accelerated timing of the financial deal amongst a number
7 of other capital/resource intensive projects here, has led
8 me to be a stickler on details and cost."

9 **Q.** Let's stop right there. What did you mean by that?

10 **A.** Well, we're taking on a large project here with this
11 implementation. I was acknowledging that we were, and we were
12 planning and preparing for that.

13 **Q.** Okay. There's a reference in here to:

14 "I appreciate the grit that Cole, Mike, and everyone
15 else have put into answering our every question -- their
16 performance has been truly awesome."

17 **A.** Yes. Again, I dealt on the other side of software sales
18 extensively. I thought that the team that NetSuite had put
19 forth had done a fantastic job of spending a lot of time,
20 energy, and resources with our team, representing what the
21 software could do and answering our questions.

22 **Q.** Did you subsequently enter into a series of contracts with
23 NetSuite?

24 **A.** We did.

25 **Q.** Why?

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1 **A.** We saw that what they represented could meet the vast
2 majority of the requirements that we had laid out. We were
3 confident that they had the system that was going to help take
4 our business to the next level.

5 **Q.** Could we please take a look at Trial Exhibit 2.

6 What is this?

7 **A.** This is the subscription services agreement that we
8 entered with NetSuite.

9 **Q.** Would you please turn to page 10.

10 There's some signatures there. Whose are those?

11 **A.** The one on the left is my signature, and the one on the
12 right is Gary Specter from NetSuite.

13 **Q.** Okay. Can you please turn to page 7. The first -- could
14 you blow the yellow part up, please.

15 Do you see a provision there that says "Limitations of
16 Liability"?

17 **A.** I do.

18 **Q.** What did you understand that to do?

19 **A.** That there would be a limit on the liability to any party
20 regarding anything that went wrong with the project.

21 **Q.** I'm sorry. I missed the first one. Let's go to the first
22 one, if you can, "Exclusion of Consequential Damages." Do you
23 see that?

24 **A.** Yes, I do.

25 **Q.** And what is your understanding of that?

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1 **A.** There was an exclusion of consequential damages for both
2 parties.

3 **Q.** Do you have an understanding of whether that exclusion of
4 consequential damages provision excludes the damages that
5 Grouse River is seeking in this lawsuit?

6 **A.** I do have an understanding.

7 **Q.** And what is that?

8 **A.** That it does not exclude them.

9 **Q.** Why not?

10 **MS. RAY:** Objection, Your Honor. This calls for a
11 legal conclusion. It's actually --

12 **THE COURT:** So I think -- well, so the objection is
13 overruled. But as a matter of fact, let him -- and maybe ask
14 your question again, just to make sure the witness understands.

15 Well, if he's talking about the contract, he can talk
16 about what the contract says as a matter of fact based on his
17 understanding of it.

18 He can't opine -- which I think is what you're getting
19 at -- about the underlying conflict with the -- that this case
20 is about fraud.

21 **MR. KIEVE:** Of course not.

22 **THE COURT:** Exactly.

23 So just make sure you listen to Mr. Kieve's questions so
24 you understand what he's asking you.

25 **MR. KIEVE:** I'm simply asking him:

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1 BY MR. KIEVE:

2 Q. Do you have an understanding of whether the exclusion of
3 consequential damages provision excludes the damages that
4 Grouse River is seeking in this lawsuit?

5 A. I don't believe it does.

6 Q. Why not?

7 A. Because NetSuite committed fraud, is my opinion.

8 THE COURT: The objection is sustained.

9 He's not allowed to say it's fraud. Right? He can say as
10 a matter of fact what the -- and you can argue all you want the
11 legal stuff when you get to your argument.

12 MR. KIEVE: I understand.

13 THE COURT: Okay. So for the jury's purposes, just so
14 you know, witnesses talk about facts. What lawyers say is not
15 evidence. What the witnesses and documents say may be
16 evidence, and you'll find what the facts are.

17 I'll tell you what the law is at the end of the case. I
18 gave you a preview of the law in the preliminary instructions.
19 At the end of the case, I'll give you final written
20 instructions that you'll be able to take into the jury room.

21 And the lawyers can argue what the answer is in their
22 closing arguments.

23 Okay. So, Mr. Kieve.

24 MR. KIEVE: Thank you very much, Your Honor.

25 \\\

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1 **BY MR. KIEVE:**

2 **Q.** There's also a provision -- I started too soon -- under
3 10.2, "Limitations on Liability." Do you see that?

4 **A.** I do.

5 **Q.** Do you have an understanding of whether the limitation of
6 liability provisions limits NetSuite's liability for the damage
7 Grouse River is seeking in this lawsuit?

8 **A.** I do have an understanding, yes.

9 **Q.** And what is that understanding?

10 **THE COURT:** Mr. Kieve, just -- I don't -- the
11 objection is sustained.

12 **BY MR. KIEVE:**

13 **Q.** Let's turn to the next page, please. There's a provision
14 in there on 11.1.

15 Hold on. Where is it? Could you blow that up? No. I'm
16 looking at the provision in there that says there are no
17 representations.

18 **MR. SUSMAN:** Last page.

19 **MR. KIEVE:** Next page.

20 **THE COURT:** Last page, I think.

21 **MR. KIEVE:** Last page. Aah, there we are. Could you
22 blow that up.

23 **BY MR. KIEVE:**

24 **Q.** Do you see that language?

25 **A.** I do.

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1 **Q.** Do you see the language that says there are no other
2 verbal agreements, representations, warranties, undertakings,
3 or other agreements between the parties?

4 **A.** I do.

5 **Q.** Okay. Did you sign the subscription services agreement?

6 **A.** I did.

7 **Q.** Did you have a lawyer advise you on it?

8 **A.** I did on parts, yes.

9 **Q.** Did your lawyer advise you on this "no representations"
10 language?

11 **A.** No, he did not.

12 **Q.** Did you negotiate this language with NetSuite?

13 **A.** No, I did not.

14 **Q.** Why not?

15 **A.** It was boilerplate language that I didn't believe it was
16 going to come out of the document, no matter what. We relied
17 on NetSuite's representations leading us into this document.

18 **Q.** Is it correct, as stated in here, that you did not rely on
19 any representations?

20 **A.** No, that's not correct.

21 **Q.** Thank you.

22 Let's turn to page 11 of TX2. What is this?

23 **A.** This is a cover page to an estimate order form that
24 followed.

25 **Q.** Okay. And was there, in fact, an estimate that was signed

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1 on or about the same time?

2 **A.** Yes, there was.

3 **Q.** Could we turn to TX4, please.

4 What is this?

5 **A.** This is a copy of the estimate form that went along with
6 the Software Services Agreement.

7 **Q.** When you signed this document, did you understand this was
8 part of the contract?

9 **A.** Yes, I did.

10 **Q.** What did you understand you were buying?

11 **A.** The products, as listed on the estimates, as they had been
12 presented to us up until that point.

13 **Q.** Okay. Did you have an understanding of whether these
14 features and products were native to NetSuite?

15 **A.** We had that understanding from the presales discussions
16 that we had had, yes.

17 **Q.** Okay. Can we turn to the next page. Turn to the next
18 page, please.

19 Did you have an understanding that these features and
20 products were ones that you were buying?

21 **A.** Yes, we did.

22 **Q.** Did you understand they were native?

23 **A.** Yes, we understood that they were native.

24 **Q.** Did you also enter into what's called a statement of work?

25 **A.** We did, yes.

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1 **Q.** What was the statement of work?

2 **A.** The statement of work describes more fully the nature of
3 the project that was going to be undertaken.

4 **Q.** Could we please take a look at TX3.

5 Is that it?

6 **A.** Yes, it is.

7 **Q.** Who signed this for you?

8 **A.** I signed this for us.

9 **Q.** Who signed it for NetSuite?

10 **A.** I believe it was signed by Gary Specter.

11 Sorry. Ryan Murphy was the signature on this one.

12 **Q.** And who was he?

13 **A.** Ryan Murphy was the professional services manager at
14 NetSuite.

15 **Q.** Now, you said "professional services manager." What was
16 professional services supposed to be doing?

17 **A.** Professional services was handling the implementation of
18 the project for NetSuite. It was their technical
19 implementation team.

20 **Q.** Did you understand you were buying a software product from
21 NetSuite?

22 **A.** Yes, absolutely.

23 **Q.** Okay. What was the statement of work supposed to do?

24 **A.** It was supposed to outline the responsibilities for the
25 implementation, in general, for both parties.

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1 **Q.** Did it include the must-haves that we've discussed?

2 **A.** Yes, it does.

3 **Q.** Okay. The estimate form, if you'll turn to the last page,
4 has a price of \$330,000.

5 **TECH ASSISTANT:** What page number is that, please?

6 **MR. KIEVE:** Last page of the estimate form, TX4.

7 Let me just skip that. Let me go straight to the
8 question.

9 **BY MR. KIEVE:**

10 **Q.** How much did you pay NetSuite under the estimate form?

11 **A.** The initial estimate was as stated, \$330,000 or so.

12 **Q.** How did you pay for that?

13 **A.** We had injected capital into the company that year in 2014
14 to fund the NetSuite project; so both the direct cost to
15 NetSuite, partner costs, infrastructure costs, and staffing
16 costs.

17 **Q.** Did you obtain any bank funds?

18 **A.** No. This was shareholder funding that we injected.

19 **Q.** Was Grouse River a family company?

20 **A.** Yes, we were.

21 **Q.** When you signed these documents, did you have any
22 understanding of the difficulty of the implementation?

23 **A.** Certainly. Software implementation always has some
24 challenges to it, and we understood that we were going to need
25 to allocate substantial resources on our side as well.

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1 **Q.** Did you tell your employees this?

2 **A.** Absolutely.

3 **Q.** How did you do that?

4 **A.** We had all sorts of internal meetings, just in general
5 conversations throughout the company, and e-mails as well.

6 **Q.** Can we please take a look at Exhibit 144. Can we blow the
7 top part of this up, please.

8 You write --

9 **MS. RAY:** Sorry. Objection, Your Honor.

10 **THE COURT:** And the grounds for the objection?

11 **MS. RAY:** This is a hearsay document. It's his prior
12 statements introduced, prior out-of-court statements introduced
13 for the truth.

14 **MR. KIEVE:** It's a contemporaneous statement of his
15 understanding of what the product was going to supply.

16 **THE COURT:** Let me look at the exhibit. Exhibit 144.

17 What was the question, Mr. Kieve?

18 **MR. KIEVE:** The question was: Does this express how
19 you viewed the NetSuite solution at the time?

20 **MS. RAY:** Why can't he just ask how he viewed the
21 NetSuite solution at the time?

22 **THE COURT:** I think that that's -- so here's the --
23 I'm going to overrule the objection, in part.

24 I think the way the question is: What did you do? What
25 did you say? Does this document memorialize what you told

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1 people? And I think that's fine.

2 **MR. KIEVE:** Thank you, Your Honor.

3 **THE COURT:** And if it was distributed to your team.

4 Is this the document that your team got for their going-forward
5 steps? Or something along those lines.

6 I think it's admitted on that grounds, and you can ask him
7 about it.

8 **BY MR. KIEVE:**

9 **Q.** Okay. Was this a document that you submitted to your
10 team, gave to your team, describing what you and the team
11 understood was to be the next steps?

12 **A.** Yes. I wrote this e-mail to our entire company.

13 **Q.** Okay. And you wrote:

14 "We have devoted a significant time" --

15 "It is important to understand that this will be a
16 strenuous and difficult process; however, it is required
17 to continue to enhance our service level and
18 profitability."

19 Did you believe that at the time?

20 **A.** Absolutely.

21 **Q.** Okay. And then there's a reference to a number of
22 specific items in here that you thought you were getting. What
23 are those?

24 **A.** We outlined a lot of the key functions that we'd stated as
25 requirements, and defined them a little more clearly in terms

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1 of our understanding following all of our conversations leading
2 up to our contracting with NetSuite.

3 **Q.** Okay. Can we go up and take a look at "Sales."

4 **A.** Yes.

5 **Q.** What did you expect from sales?

6 **A.** The key parts of what it says there are essentially, we
7 would have customer loyalty tracking. We would have an
8 integrated customer database so that we could service those
9 customers across all platforms and understand their transaction
10 history; the integration of our gift card platform across the
11 business; serialized inventory, as we've discussed.

12 **Q.** Were all these items that you expected from NetSuite?

13 **A.** Yes. Everything in this e-mail is what we expected, based
14 on the representation that we'd seen.

15 **Q.** At this point, at the end of March 2014, Grouse River has
16 now signed the contract with NetSuite. I'd like to turn to the
17 implementation phase.

18 Can we please take a look at Exhibit 201.

19 **MS. RAY:** So, Your Honor --

20 **THE COURT:** Yes?

21 **MS. RAY:** -- we have an objection again to -- just for
22 the record, I just want to make the standing objection to
23 Mr. Fallis testifying about NetSuite internal e-mails because
24 he lacks personal knowledge about them.

25 **THE COURT:** Understood, except for -- is there an

1 objection as to authenticity?

2 **MS. RAY:** No, Your Honor.

3 **THE COURT:** Okay. So it's a statement offered against
4 a party opponent, and it's admitted. It's not hearsay.

5 Now, no opining.

6 **MR. KIEVE:** No opining.

7 **THE COURT:** You can have the witness read from it. If
8 he has knowledge of it, you can state the foundation for that,
9 but there's no extrapolation from it. So it is in evidence,
10 and the witness needs foundation to talk about things, although
11 he can certainly read from admitted exhibits if that's what you
12 want to do, as can anyone.

13 **BY MR. KIEVE:**

14 **Q.** Okay. The e-mail starts on the last page with one dated
15 April 21st, 2014. Let's turn to that, please.

16 Do you see an e-mail dated May 22, 2014? That's roughly
17 two months after you signed the contract. And do you see
18 one -- it's from Ryan Murphy. You see that?

19 **A.** I see one on April 21st, 2014, if that's the one you're
20 referring to.

21 **Q.** And it's sent to Karen Messick. Who is she?

22 **A.** Karen Messick was a POS project manager assigned to our
23 project.

24 **Q.** And the "subject" line of this is "YESpay - U.K."

25 Do you know what YESpay is?

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1 **A.** YESpay is a payment integrator that helps companies take
2 credit cards through their payment systems.

3 **Q.** Okay. And how did that relate to Grouse River?

4 **A.** In our discussions with NetSuite, obviously the integrated
5 credit card processing was part of that. It was a necessary
6 component. I'd expressed concern that they had only presented
7 to us one option for doing that in Canada through a partner
8 named Mercury Payment Systems.

9 My concern was that if we were going to change payment
10 systems, there are rates involved, and I wanted to be able to
11 negotiate ideally with more than one provider. So they had
12 YESpay as another provider here.

13 **Q.** Okay. Let's turn to the second-to-the-last page of this
14 exhibit about a quarter of the way down from the top.

15 Do you see the e-mail of May 20, 2014, at 3:00 p.m. from
16 Karen Messick to Ryan Murphy?

17 **A.** I do.

18 **Q.** And she writes:

19 "Do we know if anything ever happened with this? I
20 know the customer is still fully expecting to use YESpay
21 in Canada along with numerous other things that the POS
22 doesn't have functionality for."

23 Before you signed the contract, did anyone at NetSuite
24 tell you that NetSuite's point-of-sale system did not have the
25 functionality of using YESpay in Canada?

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1 **A.** NetSuite represented that it had full capability to accept
2 chip and PIN technology in Canada.

3 **Q.** When did you first learn that NetSuite did not have that
4 capability?

5 **MS. RAY:** Objection to the question; assumes facts not
6 in evidence.

7 **THE COURT:** Overruled.

8 Well, you should ask him: Did you? So objection
9 sustained to the form of the question.

10 **MR. KIEVE:** Thank you, Your Honor.

11 **BY MR. KIEVE:**

12 **Q.** Did you subsequently learn that NetSuite did not have this
13 capability?

14 **A.** Yes, we did.

15 **Q.** How?

16 **A.** I recall it being an issue during implementation, and it
17 was still not present at the time that we went live with the
18 software.

19 **Q.** How did you learn that NetSuite knew it did not have this
20 capability?

21 **A.** I didn't really learn entirely until this lawsuit.

22 **Q.** Let's turn to the page with the number 16866 at the
23 bottom, and let's go to the e-mail about two-thirds down the
24 page, May 20, 2014, 5:46 p.m. Can we blow that up for the
25 jury, please.

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1 "Hi, Hans. There is a customer facing element that
2 must happen to be certified by YESpay. We tested the
3 basics successfully and are told by YESpay that no code
4 changes are needed. To be certified by YESpay it must be
5 run against an actual customer account for two weeks. We
6 had an internal call about this subject (not sure if it
7 was for this customer)"

8 "This customer" is referring to Grouse River;
9 correct?

10 **MS. RAY:** Objection. He's asking Mr. Fallis to
11 explain what is in someone's head.

12 **THE COURT:** Objection sustained.

13 **MR. KIEVE:** Withdrawn.

14 **BY MR. KIEVE:**

15 **Q.** (reading)

16 -- "and determined that we need a customer who wants
17 to take it on. There will need to be a few extra
18 hours for setup, and the customer needs to know they
19 would be the first in CA," Canada, "(but not the first
20 for this gateway). They need to know there is minor
21 risk, but worse case (unlikely) fallback would be MPS.
22 YESpay expects receipt modification will be needed,
23 but PS controls this."

24 Did anyone at NetSuite tell you that they never used
25 YESpay in Canada?

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1 **A.** No. We were told that they were certified with
2 NetSuite -- I'm sorry -- with YESpay in Canada.

3 **Q.** Please look at the next e-mail above, dated May 21, 2014,
4 at 11:13 a.m. This reads:

5 "Josh, I'm including Bryan because he previously stated
6 that there is a completely different application for Canada
7 that we cannot make work without doing development."

8 Question. Did anyone at NetSuite tell you that they
9 needed to do development to have credit cards work in Canada on
10 the NetSuite point-of-sale system?

11 **A.** Absolutely not. We were told it was native functionality.

12 **Q.** If NetSuite had told you that they needed to do
13 development to have credit cards work in Canada on the NetSuite
14 POS system, what would you have done?

15 **A.** We would not have contracted NetSuite if any of our core
16 requirements, as represented, were not available on the
17 platform.

18 **Q.** Let's take up the next e-mail above, dated May 21, 2014,
19 at 8:16 in the morning, a.m. This reads:

20 "That is correct, Karen. We anticipate that most of the
21 existing YESpay integration code will be applicable to the
22 North American version, but there will undoubtedly be a few
23 surprises and modifications to take into account. The
24 documentation between the U.K. version and the North American
25 version differs quite a bit and some of the details of what

1 data to include is changed as well."

2 Did anyone at NetSuite tell you to expect some surprises
3 in your ability to process credit cards?

4 **A.** Not at all.

5 **Q.** Okay. Let's turn to the first page of this e-mail chain
6 with the number 16863 at the bottom.

7 Can you pull this up. Can you blow that up for me.

8 It reads:

9 "It doesn't seem like a good idea to assume that
10 Version 2.5 and 3.3 of the EasyVTerminal function
11 identically. I am hopeful that it will 'just work,' but
12 am not at all comfortable saying that for sure. We can't
13 really predict what types of issues we may encounter. I'm
14 just being cautious in my optimism so we don't paint
15 ourselves into a corner."

16 Did anyone at NetSuite tell you about this issue?

17 **MS. RAY:** Objection.

18 **THE COURT:** Overruled. I mean, you can tell me what
19 the ground for the objection is, but the question is: Did
20 anyone tell you about this?

21 **MS. RAY:** I'm not sure what "this issue" --

22 **THE COURT:** Why don't you -- actually, okay. I'll
23 sustain the objection as to the form of the question.

24 Mr. Kieve, why don't you ask specifically, as you've been
25 doing, what you're concerned about.

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1 BY MR. KIEVE:

2 Q. What issue is being referred to here, as you understand
3 it?

4 THE COURT: Objection sustained, your objection.

5 Again, the same grounds.

6 So you can phrase your questions: Did anyone at NetSuite
7 tell you X? And then so -- and that's fine.

8 MR. KIEVE: Got it.

9 BY MR. KIEVE:

10 Q. Did anyone at NetSuite tell you the following?

11 "It doesn't seem like a good idea to assume that
12 Version 2.5 and 3.3 of the EasyVTerminal function
13 identically. I am hopeful that it will 'just work,' but
14 am not at all comfortable saying that for sure. We can't
15 really predict what types of issues we may encounter. I'm
16 just being cautious in my optimism so we don't paint
17 ourselves into a corner."

18 Did anyone at NetSuite tell you that?

19 A. No. It was never represented to us that anyone at
20 NetSuite was just hopeful that something might work regarding
21 credit card processing.

22 Q. Please take a look at the next e-mail up, dated May 21,
23 2014, at 11:37 a.m.

24 Did anyone at NetSuite tell you the following?

25 "We aren't assuming -- we have it in writing from

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1 YESpay and have tested the basics. I understand being
2 cautious, but the design and implementation was to
3 specifically avoid development/quality assurance from
4 needing to be involved with each new country. Again, I
5 agree there is some risk, but expectations have been set
6 with sales (who is supposed to set them with the
7 customer). Ultimately it is a sales call; we made them
8 aware of the risk versus the timeline to wait for
9 development/QA to take it on."

10 Did anyone at NetSuite tell you of this risk?

11 **A.** No.

12 **Q.** If the NetSuite sales team had told you that these were --
13 there were these risks, what would you have done?

14 **A.** If NetSuite had told us there was payment processing risk
15 with the system, we would not have contracted with NetSuite.

16 **Q.** Did Grouse River subsequently Go-Live with the NetSuite
17 system and the NetSuite point-of-sale system in its store?

18 **A.** We did.

19 **Q.** What date?

20 **A.** March 24th, 2015 event.

21 **Q.** What happened to Grouse River's ability to process credit
22 cards when the NetSuite system went live?

23 **A.** We could not.

24 **Q.** Why?

25 **A.** The chip terminals that were supposed to process and

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1 integrate with the system did not function.

2 **Q.** Did NetSuite ever solve this problem?

3 **A.** They did eventually.

4 **Q.** What effect did their failure to solve it for whatever
5 period of time have upon your business?

6 **A.** We needed to implement a backup terminal system and,
7 daily, manually reconcile all the transactions that occurred
8 back on to the NetSuite platform.

9 **Q.** After you signed the contract at the end of March 2014,
10 what happened next?

11 **A.** We began looking for a project manager on our front, for a
12 NetSuite system administrator, and anticipated kicking off the
13 project with NetSuite.

14 **Q.** Are you familiar with the term "business requirements
15 document"?

16 **A.** Yes.

17 **Q.** What is that?

18 **A.** It was a documentation process that we engaged with, with
19 our team and the NetSuite team, to dive into the specifics of
20 the implementation.

21 **Q.** Did it supersede or replace the contract and the statement
22 of work you signed in March 2014?

23 **A.** It did not.

24 **Q.** I'm sorry. What?

25 **A.** No, it did not.

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1 **Q.** Thank you.

2 Now, Ms. Ray told the jury in her opening statement
3 yesterday that implementation took seven months and started on
4 September 8, 2014.

5 Did it start on September 8, 2014?

6 **A.** No, it did not.

7 **Q.** Okay. What occurred on September 8, 2014?

8 **A.** We signed off on that business requirements document.

9 **Q.** When did the implementation start?

10 **A.** We had a project kickoff meeting to start the
11 implementation, I believe it was May 1st, 2014.

12 **Q.** Was there a project kickoff?

13 **A.** Yes.

14 **Q.** Did someone from NetSuite issue a project planning sheet
15 for that?

16 **A.** Yes. We were issued an initial version of a project plan
17 from our NetSuite project manager that had been assigned to the
18 project, David Mason-Jocksch.

19 **Q.** Okay. He was the project manager for the project?

20 **A.** He had been assigned as the project manager from the
21 NetSuite side, yes.

22 **Q.** Okay. Can we please take a look at the business
23 requirements document. I think it's Number 7. And I'd ask you
24 to go to page 99.

25 Is this part of the business requirements document?

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1 **A.** Yes, it is.

2 **Q.** There's a reference to "Gap Analysis." Would you please
3 explain this to us.

4 **A.** As a broad explanation, gap analysis is the idea that we
5 are calling out gaps between the functionality that we required
6 and what was being presented as available in the NetSuite
7 platform.

8 **Q.** Were you surprised to learn about these gaps?

9 **A.** Absolutely.

10 **Q.** Why?

11 **A.** They had not been presented in our presales conversations.

12 **Q.** What was the purpose of the gap analysis?

13 **A.** To identify -- trying to think of another word for "gaps."
14 To identify gaps between the platform and our necessary
15 requirements.

16 **Q.** Was one of the gap analyses buy online, pick up in store?

17 **A.** Yes, it was.

18 **Q.** Was another gap analysis gift cards?

19 **A.** Yes, it was.

20 **Q.** What had you been told about gift cards when you signed
21 the contract?

22 **A.** We had been told that the gift card process would be
23 integrated across the entire platform when we signed the
24 contract.

25 **Q.** Was there a gap analysis for point of sale being able to

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1 handle serialized inventory?

2 **A.** Yes, there was.

3 **Q.** What had you been told before then?

4 **A.** We'd been told that we'd be able to process those
5 serialized transactions through the point of sale.

6 **Q.** Did you agree to allow NetSuite to work on this gap
7 analysis to fill in the gaps?

8 **A.** We did agree to them, yes.

9 **Q.** Why?

10 **A.** They told us they could close those gaps, design or
11 develop a solution that would close them.

12 **Q.** Did you intend to waive any rights against NetSuite when
13 you signed this business requirements document identifying the
14 gap analysis?

15 **A.** Absolutely not.

16 **Q.** Why not?

17 **A.** Well, we understood NetSuite was committed to delivering
18 the functionality that they said they could deliver.

19 **Q.** When you signed the business requirements document, what
20 did you expect would happen?

21 **A.** We expected that NetSuite would go back and develop the
22 necessary scripts and development to close those gaps.

23 **Q.** Did it?

24 **A.** No, they did not.

25 **Q.** Did you subsequently learn that the native solution that

1 NetSuite asked -- provided -- excuse me.

2 (Co-counsel confer off the record.)

3 **BY MR. KIEVE:**

4 **Q.** When they didn't fix the gaps, why didn't you walk away?

5 **A.** Well, when we went live, they were still committed to
6 fixing those gaps and told us specifically that they would have
7 them done within a few days.

8 **Q.** Did they?

9 **A.** No, they did not.

10 **Q.** And why didn't you walk away at that point?

11 **A.** We had spent an enormous amount of time, money, and
12 resources getting to that point. We had spent two years with
13 our team getting ready for this project. We'd invested well
14 over a million dollars in the software partners and the
15 resources to execute it.

16 (Co-counsel confer off the record.)

17 **BY MR. KIEVE:**

18 **Q.** My colleague asked me to ask you this question. Why
19 didn't you walk away when you signed this document?

20 **A.** Because NetSuite committed to closing those gaps.

21 **Q.** Thank you.

22 Did you receive an e-mail from Mr. Waldron about this
23 subject subsequently?

24 **A.** Yes. Numerous e-mails.

25 **Q.** Okay. I'd like to take a look at Exhibit 488. This is an

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1 e-mail on or about August 2, 2014. Would you blow that up.

2 What is this telling you?

3 **A.** Essentially, that they've been able to try and develop a
4 solution to handle the serialized inventory sales issue that
5 they had identified as a gap after we had signed the contract
6 with them. But they had represented it was there prior to the
7 contract. He's saying that they have attached some details
8 regarding the specifics of how that solution is going to be
9 implemented for us.

10 **Q.** And did you sign this change order?

11 **A.** We did sign the change order, yes.

12 **Q.** Why?

13 **A.** Because NetSuite represented that the solution would
14 function as they had designed it.

15 **Q.** Okay. And he closes by saying:

16 "I look forward to having the solution signed off on
17 so we can get things rolling again with the implementation
18 and catch up for some of the time we have slowed a bit."

19 Did this delay the implementation?

20 **A.** Yes, it did. As we recall, we started our implementation
21 on May 1st with a kickoff meeting. This gap was identified,
22 and NetSuite had to go away and identify how they were going to
23 close it.

24 **Q.** Did this change order make the NetSuite system work the
25 way it was sold to you?

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1 A. No, it did not.

2 Q. Okay. Let's take a look at Exhibit Number TX34 [sic].

3 Did you have a follow-up e-mail on this issue?

4 A. Yes. We would have had numerous follow-up e-mails.

5 **TECH ASSISTANT:** Excuse me. What exhibit was that?

6 **MR. KIEVE:** 384, please. Could we blow up the top.

7 **BY MR. KIEVE:**

8 Q. It's entitled -- the first e-mail that we can see here is
9 "NetSuite Change Order to Support Serialized Inventory via
10 POS." And Mr. Rost writes to Mr. Waldron.

11 Who's Mr. Rost?

12 A. Kevin Rost was the gentleman we hired to be our NetSuite
13 system administrator.

14 Q. And he writes:

15 "Cole, Glenn is away on a hunting trip and I am
16 unsure of his access to e-mail. I am reviewing this today
17 and have a call with Paul at 2:00 p.m. today. I am hoping
18 that Glenn can respond before tomorrow with comments on
19 how he wishes to proceed. If I have not heard back from
20 him by tomorrow morning, I will review with David during
21 our scheduled meeting."

22 And then you respond a bit later:

23 "Hi, Kevin. Just reading this now. So you are
24 aware, when I am on Satellite communication, it means I do
25 not have access to e-mail -- only to voice mail on my sat

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1 phone."

2 Had you been expecting this change order when you went on
3 your hunting trip?

4 **A.** No, I had not. Not until the day before I left. Cole
5 Waldron had called me just before departing and let me know
6 that there was going to be a change order forthcoming.

7 **Q.** Did he tell you when?

8 **A.** He said that they almost had it ready, I believe, in that
9 sense.

10 **Q.** If you knew it was coming, would you have made sure that
11 you got to see it?

12 **A.** Yes, absolutely.

13 **Q.** Okay. Did anyone at NetSuite tell you that your being on
14 a hunting trip delayed NetSuite's work on any part of this
15 implementation?

16 **A.** No, they did not.

17 **Q.** Do you feel that any time you took to go hunting or other
18 trips delayed the NetSuite implementation?

19 **A.** No, it did not.

20 **Q.** Why not?

21 **A.** Because we had a team back in the office committed to the
22 project. We were also developing content for the launch of the
23 NetSuite platform to help advertise our business.

24 **Q.** Did you expect that the NetSuite people would be working
25 on this problem without your signing a change order?

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1 **A.** Absolutely, we expected that they would be able to
2 continue some work on the project, yes.

3 **Q.** Did you take any other hunting or sporting trips during
4 the time of the implementation?

5 **A.** Yes, a couple.

6 **Q.** Why?

7 **A.** That's part of what we did as a business. It's part of my
8 outdoor activities and part of my vacation time.

9 **Q.** Did your trips impact any part of Grouse River's
10 participation in the implementation of this project?

11 **A.** No, it did not.

12 **Q.** Okay. Can we take a look at Exhibit 146. Can you tell
13 the jury what this is.

14 Let's go back up -- here we are.

15 You're writing to your colleagues:

16 "I am just getting on a float plane and leaving wifi,
17 so if there is something mission critical needed to move
18 anything along, please have Heather provide you with my
19 Sat phone number and there is voice mail there that will
20 be checked every couple of days."

21 What are you saying here?

22 **A.** Essentially, that if there's anything mission critical
23 that needs to move along while I'm away, contact me via the
24 phone number that was always available when I was away, my sat
25 phone.

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1 **Q.** Let me ask you a question. Ms. Ray told the jury
2 yesterday that Grouse River made misrepresentations to
3 NetSuite.

4 Has NetSuite ever, before Ms. Ray made that representation
5 yesterday, accused Grouse River of any misrepresentation?

6 **A.** No, they have not.

7 **Q.** Have you seen any communication from NetSuite that
8 sustained Ms. Ray's assertion?

9 **A.** I never have.

10 **Q.** Are you aware of any document that sustains Ms. Ray's
11 accusation?

12 **A.** No, I'm not.

13 **Q.** Did NetSuite ever complain about anything improper that
14 Grouse River did?

15 **A.** No, they did not.

16 **MR. KIEVE:** I probably misread his note exactly.

17 **BY MR. KIEVE:**

18 **Q.** Did NetSuite ever complain about any hunting trips you
19 ever took?

20 **A.** No, they did not.

21 **Q.** I'd like to take a look at Exhibit Number 497. This is a
22 series of internal e-mails within NetSuite.

23 I'd like you, please, to turn to page 13, and you'll see
24 an e-mail from David Mason-Jocksch to Ryan Murphy on August 12
25 at 1:14 p.m. There's a reference to a GRO status meeting.

1 **MS. RAY:** Your Honor, I'm just going to pose an
2 objection.

3 **THE COURT:** Yes, of course.

4 **MS. RAY:** So I know the instructions are exchange
5 exhibits that we intend to use. We've now -- this is, I think,
6 the third document that was not identified for us.

7 **THE COURT:** The only thing is, it's in my binder. So
8 I don't know -- so I -- which I had --

9 **MS. RAY:** Right. And, again, they didn't provide a
10 binder to us. They gave us a list of exhibits they intended to
11 use, and this is the third one that's not on that list.

12 So I don't know what your rule is with regard to documents
13 that have not been disclosed, but I just wanted to flag that --

14 **THE COURT:** Well, I don't know whether it -- well, (a)
15 it's a NetSuite e-mail. And I don't know -- I honestly don't
16 know. You have it in the exhibit binder. It's tagged with an
17 exhibit number. I assume -- and maybe it's a misnumbering
18 issue.

19 No? Is it a new exhibit?

20 **MS. XI:** It's their exhibit.

21 **THE COURT:** It's their exhibit that you're using?

22 **MR. KIEVE:** Yes. It's their exhibit.

23 **MS. RAY:** All I'm saying is -- I'm just raising
24 because -- I mean, we let it go for the first couple of ones.
25 We're just seeing a series of documents that they did not

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1 disclose to us that they intended to use with Mr. Fallis.

2 **MR. KIEVE:** I think we did, but I may be mistaken.

3 **THE COURT:** So as a courtesy, you're supposed to
4 disclose all the exhibits you're using because it's only fair
5 and that's my rule.

6 If it's on the exhibit list and it's your exhibit, I will
7 let it go.

8 But you really need to tell them the exhibits you're going
9 to use in advance, and you should have made the binders, and it
10 would make it a lot easier.

11 And I would have given -- I should have given my binders
12 over last night. So I'm going to take some responsibility.
13 But that's fine. Because you're showing the exhibits, I'm just
14 going to give you the binders to make it easy. I'm happy for
15 you to have it. At least you can look at it.

16 **MS. RAY:** We made our own binder. We just don't have
17 some of them in it because we didn't know these documents were
18 going to be shown. That's all.

19 I can pull up the document. I wanted to raise it because
20 I let it go, but we're getting into, like, it's repetitive. So
21 I'm just trying to understand what the parameters are.

22 **THE COURT:** No, I understand. I'm going to allow the
23 exhibit as a party --

24 **MR. KIEVE:** Thank you, Your Honor.

25 **THE COURT:** -- as a party opponent statement.

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1 And you may inquire.

2 **BY MR. KIEVE:**

3 **Q.** Okay. Would you please turn to page 13, and you'll see an
4 e-mail from David Mason-Jocksch to Ryan Murphy on August 12 at
5 1:14 p.m. There's a reference to a GRO status review meeting.

6 Do you have an understanding of what GRO refers to?

7 **A.** Grouse River, yes.

8 **Q.** Okay. Now, let's turn to the next page. Do you see at
9 the top where it says "Glenn has two issues"?

10 Can we blow that up.

11 Can you please tell the jury about this.

12 **A.** Yes. We're talking about the serialized gap, and the idea
13 that they're proposing to close that gap, and the idea that
14 this will not necessarily work for our business.

15 **Q.** Was this a problem?

16 **A.** Yes, it was. We needed to design it in a way that they
17 had represented it would work for our business.

18 **Q.** Would you please turn to the top of page 13. There's an
19 e-mail at 2:05 p.m. from Gary Specter, a NetSuite
20 vice president. He asks:

21 "Did we know about a 'non-firearm serial
22 requirement'?"

23 And then let's turn to the next e-mail on page 12 at
24 1:08 p.m. Can we blow that up.

25 "No, we did not. The use case during the sales cycle

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1 for serialized inventory was firearms."

2 Is that statement true?

3 **A.** No, it is not.

4 **Q.** Why not?

5 **A.** Specifically during our sales process, we discussed our
6 full product assortment with NetSuite. We carried over 20,000
7 SKUs. And a number of our serialized items are not firearms.

8 There is communication that I've seen from Mr. Waldron
9 directly acknowledging that firearms is a primary use case
10 scenario.

11 **Q.** Please look further up on the page to the e-mail at
12 2:17 p.m. This one is from Ryan Murphy.

13 Who is Ryan Murphy?

14 **A.** Ryan Murphy was overseeing the professional services team.

15 **Q.** Was he involved in your negotiation of the contract?

16 **A.** He was involved in the presentations prior to the
17 negotiations of the contract and in the statement of work.

18 **Q.** Did you have any discussions with him about serialized
19 inventory?

20 **A.** He would have been part of those presentations where we
21 had discussed all of our serialized items.

22 **Q.** Okay. And then he writes:

23 "The only notes around serialization on the PSE is
24 around firearms. When I got involved at the 11th hour,
25 the only serialization requirement I heard was around

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1 firearms. Which at that point, we had made the
2 recommendation for them to process firearm sales in
3 NetSuite, and not the point of sale. Somewhere, there is
4 a disconnect around what Glenn expected, and what we
5 thought he expected."

6 Did Mr. Murphy get involved at the 11th hour?

7 **A.** In this particular issue, I believe he did.

8 **Q.** There's a reference in his e-mail to a disconnect between
9 what you expected and what NetSuite thought you expected.

10 Was there any disconnect in your mind?

11 **A.** Not at all. We had seen serialized items in the
12 presentations as available through point of sale and on the
13 estimate we signed.

14 **Q.** Okay. Can we take a look at Exhibit Number 501, please.

15 Did Grouse River enter into a change order for this
16 serialization issue?

17 **A.** We did, yes.

18 **Q.** Is this that change order?

19 **A.** It looks to be. It's hard to tell from the first page
20 here.

21 **Q.** Okay. Can we turn to the next page.

22 Does that refresh your recollection?

23 **A.** Now we're too big.

24 **Q.** Okay.

25 **A.** Yes. There is the Script Number 1. I can see the very

1 top of it there.

2 **Q.** And that's for the serialization issue?

3 **A.** Yes.

4 **Q.** Okay. Why did it take -- this is now dated September 16,
5 2014. Why did it take so long to have this change order
6 signed?

7 **A.** It was represented in some of the communication we just
8 reviewed, just the idea that initially, what NetSuite proposed
9 wouldn't meet the functionality that they'd represented to us,
10 and so we pushed it back.

11 **Q.** Was Grouse River responsible for the time delay?

12 **A.** No, not in that case at all.

13 **Q.** Why did you sign this change order?

14 **A.** Because as it was finally presented, it would meet a
15 subset of the initial requirement, and we felt that it would
16 meet the initial requirements of our business to go forward
17 with the project.

18 **Q.** When you signed the change order, did you understand that
19 Grouse River was waiving any rights or agreeing not to hold
20 NetSuite accountable?

21 **A.** No, not at all.

22 **Q.** Did this change order make the NetSuite system work the
23 way that NetSuite promised it?

24 **A.** No, it did not.

25 **Q.** Let's take a look at Exhibit Number 206. This is a set of

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1 internal NetSuite e-mails in October 2014. Let's look at the
2 page with the number 27077 at the bottom.

3 Can you blow it up, please.

4 Mr. Waldron writes to Mr. Gary Specter, the vice president
5 at NetSuite. He writes:

6 "As you know, we have been struggling to fulfill what
7 has become a key requirement for Grouse River Outfitters.
8 30 to 40 percent of Grouse River's total revenues are via
9 the sale of serialized items which is not currently
10 supported with NSPOS."

11 NSPOS is what?

12 **A.** The NetSuite point-of-sale system.

13 **Q.** (reading)

14 "There are items such as high-end optics, firearms,
15 et cetera, which range in price from several hundred
16 dollars to tens of thousands of dollars."

17 It describes a temporary process via scripting. And then
18 he says at the bottom (reading) :

19 "Creating items as non-serial items in NetSuite would
20 solve the NetSuite point of sale problem, but it creates a
21 tremendous risk when tracking those inventory items
22 (employee theft, inventory receiving/shipping, et cetera).
23 In addition, items would then need to be re-created when
24 NSPOS supports serialized items in the future, meaning all
25 historical sales information for those items would be

1 lost."

2 Did NetSuite tell you about these issues before you signed
3 the contract?

4 **A.** Absolutely not.

5 **Q.** What effect would these issues have on you?

6 **A.** We would never have signed the contract with these issues.

7 **Q.** Let's please take a look at 27076, page 27076 on this
8 TX206. Can we blow that up, please.

9 Mr. Jenkins, Branden Jenkins, writes to Gary Specter on
10 October 25, 2014:

11 "Grouse is on top of our list for the limited release
12 in January. We'll be reaching out to him and the others
13 regarding next steps and expectations. This will be in
14 the next few weeks. Bottom line, he'll still need NSPOS
15 and this script to support his business even during the
16 limited release of SCIS."

17 What does this tell you?

18 **A.** This was a follow-up from a meeting I'd had with
19 Mr. Specter and Mr. Waldron where we discussed some of the
20 implementation issues around this, and they'd committed that we
21 would be provisioned with the next generation of the
22 point-of-sale system which would include this functionality as
23 native, just as it had been represented before we bought the
24 software.

25 **Q.** Did that indicate to you that the present generation did

1 not do it?

2 **A.** That's correct. We already knew that from the change
3 orders.

4 **Q.** Mr. Gary Specter is the vice president at NetSuite?

5 **A.** Correct.

6 **Q.** He's the person who signed your contract?

7 **A.** Yes.

8 **Q.** Can you go back to the business requirements document,
9 Trial Exhibit 7, on page 60. Just above the heading "Manage
10 Return Authorizations," could you blow that up, please.

11 There's this entry:

12 "There are currently 4,000 to 5,000 credit card
13 transactions per month amounting to approximately
14 \$1 million in monthly sales."

15 When you went live with NetSuite, was that an accurate
16 statement?

17 **A.** Yes. We were tracking towards that.

18 **Q.** When you went live with NetSuite, did anything happen with
19 your credit card charges?

20 **A.** Well, we had to maintain our existing payment provider and
21 use a backup terminal, as I had indicated earlier, and
22 reconcile those transactions each day, while we waited for
23 NetSuite to rectify the issue with the in-system processing.

24 **Q.** Did there come a time when the NetSuite system went live?

25 **A.** Yes. March 24th, 2015.

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1 **Q.** How long after the contract was signed did that occur?

2 **A.** It was almost exactly a year.

3 **Q.** Did you expect the implementation period to take that
4 long?

5 **A.** No. We had been told the implementation would take four
6 to five months.

7 **Q.** What impact did that have on your company?

8 **A.** It was substantial. The amount of resources that we were
9 dedicating to the project was substantial, employee-wise,
10 time-wise, distraction-wise. And the project went on about two
11 and a half times longer than NetSuite had indicated it would
12 take.

13 **Q.** Did the NetSuite function the way NetSuite told you it
14 would function when you went live?

15 **A.** Not at all.

16 **Q.** Can you tell the jury why not?

17 **A.** We've reviewed a lot of the credit card processing issues
18 that occurred. The e-commerce checkout would crash. Customer
19 accounts that existed within our system couldn't be accessed by
20 people on the e-commerce platform.

21 One of the biggest detrimental factors was the fact that
22 the transactions going through the point-of-sale wouldn't
23 integrate back into the ERP system. And it was random. We
24 wouldn't know which transactions were missing. It wouldn't hit
25 our inventory. The customer records wouldn't update.

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1 It was disastrous.

2 Q. Before you went live, were there still unresolved issues?

3 A. Yes, there were. Yes.

4 Q. Why did you agree to go live?

5 A. As I indicated earlier, we had a Go-Live meeting or a
6 pre-Go-Live meeting with a senior consultant from NetSuite who
7 indicated that all the outstanding issues prior to Go-Live
8 would be handled within a matter of days.

9 Q. Did that happen?

10 A. No, it did not.

11 Q. Ms. Ray told the jury yesterday in her opening statement
12 that the issues at Go-Live were resolved very quickly. Is that
13 accurate?

14 A. No, it is not.

15 Q. Please take a look at Exhibit Number 212. This is a set
16 of e-mails starting with one you sent on March 12, 2015, to
17 Satish Iyer.

18 Who is Mr. Iyer?

19 A. Mr. Iyer was a senior individual within the professional
20 services organization at NetSuite.

21 Q. Is this the e-mail that you sent him?

22 A. I don't see the date on it. It is signed with my
23 signature. Yes, I sent it.

24 Q. Can we go to the first page just to verify that it is, or
25 the preceding page.

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1 Is this the e-mail that you sent him?

2 **A.** Yes. On March 25th, yes.

3 **Q.** Can we go back to the highlighted text, please.

4 **A.** I beg your pardon. March 24th is the date of my e-mail.

5 **Q.** Okay. You write:

6 "Hi, Satish. Could I please request the courtesy of
7 your reply as I am not sure that you are the right contact
8 for all of these items"

9 Please describe what you're telling Mr. Iyer the day you
10 Go-Live?

11 **A.** It's as it says. We cannot process credit card payments
12 due to, in quotations, unique issues on NetSuite's end
13 integrating our POS terminals. The point of sale is still not
14 syncing our inventory, leading to items scanning at zero
15 dollars and the inability to sell those products. And a number
16 of scripts that had been in development since last year are
17 still incomplete.

18 **Q.** Could we move it up, please.

19 **A.** There's also the core issue at the bottom, referring to
20 SCA, which was the SuiteCommerce or the e-commerce platform,
21 and the idea that it was supposed to, at a matrix item level --
22 I'll just explain that quickly. It'd be a shirt in colors and
23 sizes, would be an example. That each of those child products
24 was supposed to update and indicate in and out of stock as
25 those items went in and out of stock.

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1 **Q.** Is this an accurate description of what happened on the
2 Go-Live date?

3 **A.** Yes, it is.

4 **Q.** Were these problems ever solved?

5 **A.** No, they were not.

6 **Q.** You also sent this, if we move it up, to Zach Nelson.

7 Who is Zach Nelson?

8 **A.** Zach Nelson was the chief executive officer of NetSuite.

9 **Q.** Why did you send it to him?

10 **A.** I was extremely concerned that we had spent the amount of
11 time, money, and resources on the project that we had; that
12 we'd gone more than two and a half times as long as NetSuite
13 indicated it would take to get the product live; that we had
14 commitments to fix these issues and they had gone unresolved;
15 and NetSuite seemed -- didn't seem committed to getting them
16 resolved in a timely manner.

17 **Q.** Let's take a look at the last e-mail on the first page of
18 this Exhibit 212. You write to Mr. Iyer, and at the bottom of
19 this highlighted text, you write:

20 "We have now been a NetSuite customer for a full year
21 and NONE of the scripts that we contracted are complete or
22 functional. Our POS system went live with major errors,
23 including an inability to process any type of card
24 payment."

25 Is that an accurate statement?

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1 **A.** Yes, it is.

2 **Q.** Did you receive any complaints from your online customers
3 after you went live with the NetSuite website?

4 **A.** We did.

5 **Q.** How many?

6 **A.** Hundreds. Thousands.

7 **Q.** Okay. Were these maintained by Grouse River as part of
8 its normal business records?

9 **A.** Yes, they were.

10 **Q.** Were they made by someone with knowledge at the time they
11 were made?

12 **A.** They were written by customers. They would have knowledge
13 of the experience they were facing, yes.

14 **Q.** Where can these e-mails be found today?

15 **A.** Most of them would be contained in the NetSuite CRM
16 application.

17 **Q.** And does NetSuite have access to that?

18 **A.** They were provisioned access as part of this lawsuit, yes.

19 **Q.** Did you extract a representative sample of these
20 complaints from the CRM system?

21 **A.** We did.

22 **Q.** Did you put them into a document?

23 **A.** I did.

24 **Q.** Has Grouse River designated this document for use in this
25 case?

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1 **A.** Yes, we did.

2 **MS. RAY:** Objection, Your Honor.

3 **THE COURT:** Well, your objection is the hearsay
4 objection?

5 **MS. RAY:** No. The objection is you already ruled on
6 this document and said it was excluded.

7 **THE COURT:** Right. He can ask about -- so far, like,
8 he can ask about the document. He can ask about complaints.
9 He can ask about all those things.

10 The document's not been put in evidence, offered in
11 evidence yet. So let's hold that thought. But I did already
12 say yesterday that he can testify about he got complaints and
13 what he did in response to them, but that the --

14 **MR. KIEVE:** I apologize, Your Honor. I did not
15 understand that you were excluding the document if I made a
16 proffer as to the representative samples. But if that's your
17 ruling, that's fine.

18 **THE COURT:** Yeah, yesterday I said it's hearsay. But
19 I mean, it's fine for him to say he got complaints and, in
20 reaction to the complaints, did he do specific things, and what
21 were those specific things that he did.

22 **MR. KIEVE:** Thanks. Okay.

23 **THE COURT:** So without talking about the content of
24 the complaint, what did you do?

25 \\\
\\

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1 BY MR. KIEVE:

2 Q. What did you do in response to those complaints? Did you
3 respond to the customers?

4 A. Yes, we would have responded to the customers, yes.

5 Q. And what did you tell them?

6 A. We, in some cases, told them we just launched a new
7 website, that there was challenges. We helped them with
8 account issues if they couldn't log in. Did anything we could
9 to try to take care of the customer at the end of the day.

10 Q. Did you continue to receive complaints from your customers
11 about the website?

12 A. Yes, we did.

13 Q. How long did that continue?

14 A. Throughout the entire course until we closed down our
15 business.

16 Q. And to what do you attribute that?

17 A. To the issues that we've already discussed here today. If
18 customers can't check out on your website, if customers can't
19 log into their account, they complain. Some of them complain.
20 Some of them just go away.

21 Q. Did you ask NetSuite to fix this?

22 A. We did.

23 Q. What did they say?

24 A. They told us they were working on it.

25 Q. Did they ever solve it?

A. No, they did not.

Q. Did you have these problems with your previous website before you went live with Grouse River?

A. No, we did not.

Q. What was the status of your website commerce before you went live?

A. We were growing at -- in the triple digits, doubling sales year over year most years. It had become the core component of our business, from being a very small portion in 2008 to being 50 percent or greater in 2015.

MR. KIEVE: Would this be a good time for a break, Your Honor?

THE COURT: Yes. Just let me just ask. Just give me a second.

All right. Good. We'll take a 15-minute break.

Court is in recess.

(Recess taken at 10:58 a.m.)

(Proceedings resumed at 11:25 a.m.)

(Proceedings were heard in the presence of the jury:)

THE COURT: Okay. Everyone may be seated.

And, Mr. Kieve, you may resume your examination.

MR. KIEVE: Good morning again.

Q. Mr. Fallis, before the break, you had testified about the impact upon your web commerce as a result of going live with NetSuite. I'm going to hand you a computer -- actually you

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1 have the computer -- and ask you to pull up a demonstrative
2 exhibit.

3 The first question is: You just testified how defective
4 the search functionality was that NetSuite provided you. Have
5 you prepared a demonstrative exhibit to illustrate how the
6 search functionality was defective on grouseriver.com?

7 **A.** Yes, I did.

8 **Q.** What is it?

9 **A.** It's a video that was taken in April 28th, 2016, a little
10 over a year after we were live on the NetSuite platform, and it
11 demonstrates the erroneous results that the search
12 functionality on the website would provide to our customers.

13 **Q.** I'm sorry. Did I hear you say you created it?

14 **A.** I did, yes.

15 **Q.** Okay. Is this a fair and accurate portrayal of how the
16 search functionality worked on grouseriver.com as of April 28,
17 2016?

18 **A.** Yes. And throughout the NetSuite implementation until
19 that time, yes.

20 **MR. KIEVE:** May I offer it, Your Honor?

21 **THE COURT:** Well, it's a demonstrative --

22 **MR. KIEVE:** Correct.

23 **THE COURT:** -- so you can display it.

24 **MS. RAY:** And I have a continuing objection for the
25 record.

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1 **THE COURT:** Your standing objection is noted, yeah.

2 **BY MR. KIEVE:**

3 **Q.** Mr. Fallis, will you please play it for the jury and
4 explain what it shows.

5 **A.** Sure.

6 So I have navigated onto the home page of our website
7 here, and I'm going to punch in a search term in the search bar
8 at the top. Here I'm going to type in "7-millimeter brass,"
9 which would be a common component used by our customers, and
10 we'll see what kind of results turn up. So I'm hitting "Enter"
11 waiting for a result set.

12 I do get one, and we can see that there are a couple of
13 items at the top that have some relevance to the search,
14 although they are not brass. They have the word "7-millimeter"
15 in them.

16 We can also see the search has turned 1,002 results here
17 to the customer and that most of the items following the first
18 two have no relevance to the search terms whatsoever. We've
19 got 6-millimeter and then we have something that doesn't
20 correspond at all.

21 As I scroll down the page, we get into items that are
22 absolutely irrelevant: Sleeping bags, backpacks, all sorts of
23 other items here.

24 As I get down to the bottom of the page, I do get some
25 items that have the word "brass" in them.

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1 And it's just an illustration of just how frustrating the
2 search experience was for our customers on this website. You
3 had no concept of what you were going to get when you punched
4 in any kind of search; and it would, you know, as it shows
5 here, return thousands of irrelevant results.

6 **Q.** Was this typical of the performance of the website
7 throughout the time that you operated it after going live with
8 NetSuite?

9 **A.** Yes, it is.

10 **Q.** Okay. You also told the jury about how one of the
11 eCommerce functionalities that NetSuite provided could not
12 execute online checkouts. Have you prepared a demonstrative to
13 illustrate that lack of functionality?

14 **A.** I do have one here, yes.

15 **Q.** What is it?

16 **A.** This is a video that was taken on August 1st, 2017, after
17 we had closed down our operations, but it is representative of
18 the checkout failure that existed throughout our entire use of
19 the NetSuite eCommerce platform. It shows essentially the
20 checkout loading -- or failing to load, I should say. The
21 customer being left in a dead-end experience.

22 **Q.** Did you prepare this video yourself?

23 **A.** I did.

24 **Q.** Is this a fair and accurate portrayal of how the online
25 checkout worked -- or, rather, did not work on grouseriver.com

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1 as of August 1st, 2017?

2 **A.** Yes, and throughout the entire instance of our use of the
3 NetSuite platform.

4 **Q.** Would you please show it to the jury.

5 **A.** (Witness complying.) I'm going to a cart here that I have
6 added some items to. I'm going to hit "Proceed to checkout."
7 You can see a status bar loading as you would on a typical web
8 browser, and it completes indicating that the page is loaded
9 but there is no result returned on the screen. I decide to
10 reload the page in an attempt to get a result, and I get the
11 same status bar completion happening and, again, a blank page.

12 As a last-ditch effort, I go back to the home page and go
13 to the cart again and attempt to reload it and go back to
14 checkout, and I get the same result again.

15 As a customer, I can't do anything here. I cannot
16 purchase a product.

17 **Q.** You were promised responsive website design. Have you
18 prepared a demonstrative to illustrate how NetSuite did not
19 deliver on its promise of a responsive design to Grouse River?

20 **A.** Yes, I did.

21 **Q.** Tell me what you prepared.

22 **A.** It was prepared again on April 28th, 2016, a year or so --
23 a year and more after we'd gone live. The NetSuite platform
24 was to deliver a responsive website that would adapt to tablets
25 and phones. They're essentially how customers shop in this day

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1 and age and an evolving part of our business.

2 This demonstrative shows the frustration that a customer
3 would encounter trying to click on search results that they
4 would receive using that responsive website.

5 Q. Did this persist throughout the time that you were on the
6 NetSuite platform?

7 A. Yes, it did.

8 Q. Would you show it to the jury, please.

9 A. (Witness complying.) So I'm on an iPad here and I have
10 a search term populated in the search bar. I will go and start
11 to get a result set from that search term by clicking on it.
12 If I click on any of the items that come up here, I'm expecting
13 it's going to take me to the item. The list disappears and the
14 website goes nowhere. As a customer, I cannot navigate.

15 Q. Okay. Thank you. You can put that down.

16 Are there key metrics for a website?

17 A. Sorry.

18 Yes, there are key metrics for the website.

19 Q. What are they?

20 A. Some of the major metrics would be the speed of the
21 website, both in terms of the server response and the page-load
22 time, customer conversion. Obviously our overall sales was a
23 major metrics.

24 Q. What is server response?

25 A. Server response is the time it takes for the back-end

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1 server -- in this case our site was hosted by NetSuite, so this
2 would be NetSuite's server -- to respond to an incoming
3 customer request to access our NetSuite -- our website.

4 Q. And what is page-load time?

5 A. Page-load time is essentially the ultimate time it takes
6 for that customer to receive the content on their screen when
7 they would see the full content of the website visible to them.

8 Q. What was the NetSuite server response after you went
9 online with Go-Live?

10 A. It was in the multiples of seconds.

11 Q. When you say multiple, what kind of a multiple?

12 A. Three seconds, four seconds. In that range.

13 Q. How did that compare to your prior use of the website with
14 Volusion?

15 A. It was much slower and it was far slower than NetSuite had
16 represented.

17 Q. Was this a NetSuite problem or a Grouse River problem?

18 A. This was a NetSuite problem. The server response time is
19 completely out of our control.

20 Q. What was the average response time prior to the time that
21 you went live?

22 A. On our old platform?

23 Q. Yes.

24 A. Subseconds, half-second range.

25 Q. And what happened when you went on the NetSuite system?

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1 **A.** It fell into that three- to four-second range and got
2 progressively worse.

3 **Q.** How worse?

4 **A.** Ultimately we had a total page-load time of over 10
5 seconds. Roughly 50 percent of that number is the server
6 response time.

7 **Q.** What did this do to your business?

8 **A.** It created our online experience. Our customers wouldn't
9 put up with the frustration of a website that loaded that
10 slowly.

11 **Q.** Please take a look at TX218. Tell us what this is.

12 **A.** This is an e-mail that I wrote to Zach Nelson, the chief
13 executive officer at NetSuite, on May 5th, 2015.

14 **Q.** Why did you send it to him?

15 **A.** We were roughly six weeks after our Go-Live date and I was
16 extremely frustrated with the experience that the SuiteCommerce
17 platform was serving up, and I decided to write him an e-mail
18 to express that frustration.

19 **Q.** You say (reading):

20 "Since launching the SuiteCommerce product, our
21 eCommerce business, which represented 60 percent of our
22 company's revenues, has tanked by 70 percent. We paid up
23 front in full over a year ago for professional services to
24 deliver specific functionality and support that remains
25 undelivered in the face of the above results."

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1 Was that an accurate statement at the time?

2 **A.** Yes, it was.

3 **Q.** Okay. Would you bring us to the bottom part of this,
4 please.

5 What did you ask Zach Nelson, the CEO of NetSuite, to do?

6 **A.** It states it there, but the essence was that I wanted
7 somebody assigned to the project that could carry out the
8 responsibilities and execute the deliverables as we'd
9 contracted them and as they'd been represented to us.

10 **Q.** At the bottom of this paragraph you write what?

11 **A.** (reading)

12 "I'm requesting your help as this is rapidly
13 approaching a critical point of costing our company's
14 reputation, a cost far greater than the hundreds of
15 thousands in already lost sales. Given the severity of
16 the circumstances, it would be inappropriate for me to
17 assume anything here so the courtesy of your reply is
18 requested. Do I have your support in actioning the above
19 items?"

20 **Q.** Now, did Mr. Nelson ever respond to this?

21 **A.** No, he did not.

22 **Q.** Ms. Ray mentioned that you, Grouse River, was part of a
23 Customer Advisory Board. What was that?

24 **A.** The idea was to gather a group of customers and provide
25 input on the future direction of the retail products that

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1 NetSuite sold.

2 **Q.** Did your being on the Customer Advisory Board have any
3 effect upon the service and response you got from NetSuite?

4 **A.** I don't know if I would speculate to that. I don't know
5 for sure.

6 **Q.** Okay. Can we please take a look at Exhibit Number 55.

7 This is a series of e-mails beginning on April 22, 2015,
8 and ending on May 6, 2015.

9 Can we please turn to page 11051 at the bottom.

10 You are writing to Amed Abid. Who is he?

11 **A.** He was the individual who had been the primary consultant
12 on the implementation of the SuiteCommerce portion of our
13 project.

14 **MR. KIEVE:** I don't think we have the right page. I'm
15 looking for page 10 -- 11051.

16 **TECH ASSISTANT:** That is this page.

17 **MR. KIEVE:** Okay.

18 (Pause in proceedings.)

19 **MR. KIEVE:** Let's try 11049.

20 **TECH ASSISTANT:** Does it have a page number?

21 **MR. KIEVE:** No. I'm sorry. 11050.

22 **MR. SUSMAN:** Use the printed page.

23 **MR. KIEVE:** That's what I'm doing. 11050.

24 (Pause in proceedings.)

25 **THE COURT:** It's page 4 of 6.

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1 **MR. KIEVE:** Page 4 of 6.

2 Could we blow that up, please.

3 **Q.** (reading)

4 "Hi, Amed. Thanks for the quick response. I want to
5 be on record that after a month of using SCA, we have seen
6 a circa 70 percent drop in traffic and an 80 percent plus
7 decline in orders in web revenue."

8 Is that an accurate statement?

9 **A.** Yes.

10 **Q.** What is SCA?

11 **A.** SuiteCommerce Advanced. It was the eCommerce portion of
12 our project.

13 **Q.** Let's look at the first page of this exhibit, an e-mail
14 dated May 6, 2015.

15 Would you blow that up, please.

16 You write (reading):

17 "The SCA product cannot even return basic relevant
18 search results matching product names and we're now left
19 looking at third parties to solve something as basic as
20 searching for products on the site itself. In summary, it
21 is obvious that we were guided towards launching a product
22 that had known issues that you chose not to present up
23 front, chose to walk away from in the contracted
24 refinement period after Go-Live and then play ignorant
25 about (see e-mail chain from Amed below). This has led to

1 hundreds of thousands in lost sales."

2 Was that an accurate statement?

3 **A.** Yes, it was.

4 **Q.** Can we please look at Exhibit Number 238.

5 What is this?

6 **A.** This is the statement of work dated May 30th, 2015, after
7 our Go-Live.

8 **Q.** Okay.

9 **A.** It's the statement of work issued for additional items
10 that were left hanging over at our Go-Live.

11 **Q.** Did you pay anything for this change order?

12 **A.** No, we did not.

13 **Q.** Did you agree to waive any claims you'd given NetSuite by
14 signing it?

15 **A.** No, we did not.

16 **Q.** Please turn to page 4 of this document. Do you see the
17 highlighted portion there?

18 **A.** Yes, I do.

19 **Q.** Could we blow that up, please.

20 Tell us what we're talking about here.

21 **A.** So this was the statement of work signed after we went
22 live with the project calling out issues that were unresolved;
23 and they are as identified here, that we basically cannot
24 redeem our gift certificates, is what that's referring to in
25 issue number two there, at the point of sale. We cannot use

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1 debit cards through our point-of-sale system. The in-store
2 pickup functionality is nonexistent at the point of sale.
3 There are duplicate items, meaning our inventory would
4 replicate and we would have duplication of those inventory
5 items in the point of sale. The scripts that we had contracted
6 NetSuite to fulfill with regards to closing -- or adding some
7 additional areas of functionality were remaining outstanding.
8 And that the applying deposits to invoices refers to the
9 serialization component of that.

10 Q. There's a reference in here to child matrix items about
11 halfway up (reading) :

12 "Child matrix items are being updated twice by the
13 script."

14 Could you tell the jury what a child matrix item is and
15 how the failure of this product impacted your business?

16 A. Yes. There were numerous issues with matrix items. The
17 essence of it, as we described earlier, was the idea that you
18 might have a shirt or some clothing item, any product that has
19 variations in color or size, and it creates a matrix of what we
20 might call child products. You'd have a parent to represent
21 the group and children would be the idea of a size and a color.

22 In this case, the special script that we had contracted
23 NetSuite to do to update our pricing on a regular basis, they
24 were being updated twice. But this is just one of the numerous
25 issues that the matrix items served up on the platform.

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1 **Q.** Are these fundamental flaws?

2 **A.** Absolutely.

3 **Q.** What was the purpose of signing this statement of work?

4 **A.** We stated to us that NetSuite professional services
5 required us to sign this document in order to get their own
6 internal team supplied to come back to work on the project.

7 **Q.** Did you have any communications with the NetSuite people
8 where you confirmed that you weren't waiving any rights by
9 signing these agreements?

10 **A.** Yes, absolutely I did.

11 **Q.** How many?

12 **A.** I recall at least one e-mail communication regarding this
13 because I was concerned that NetSuite was continuously asking
14 us to sign these documents just to continue work on things that
15 they'd already contracted to.

16 **Q.** And what did you say?

17 **A.** I stated, it would be along the lines of, I'm signing this
18 so that you can navigate your own internal red tape so that you
19 guys can execute on fixing these issues, and that there will be
20 no cost to us to fix these issues and this is not the full
21 extent of the issues here. We're just tackling these ones now.

22 **Q.** And when you wrote that, did someone from NetSuite
23 respond?

24 **A.** Yes.

25 **Q.** What did they say?

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1 **A.** They said, "We agree."

2 **Q.** Okay. Did NetSuite ever solve these problems?

3 **A.** Not all of them, no.

4 **Q.** Okay. When you signed these -- no. Skip that.

5 Did you have any conversations with Ryan Murphy along the
6 same lines that "We're signing these documents but we're not
7 going to waive any of our rights"?

8 **A.** Yes. I believe it was a later point in time. Again, we'd
9 been continuously asked to sign updated documents to fix these
10 issues, and I was frustrated with that process.

11 **Q.** Were these conversations in e-mails?

12 **A.** Combination of e-mails and phone calls.

13 **Q.** And does NetSuite have them?

14 **A.** I believe they would, yes.

15 **Q.** Okay. Please look at Exhibit 256. This is a set of
16 e-mails in June 2015. Let's look at page 2.

17 You're writing to Satish Iyer and Dinesh Chaurasia. Who
18 was Mr. Iyer?

19 **A.** Satish Iyer was senior professional services manager.

20 **Q.** And who was Dinesh Chaurasia?

21 **A.** I believe he was of the same nature but covered
22 eCommerce as well.

23 **Q.** Explain to the jury what you're communicating here.

24 **A.** I had had a call with Dinesh -- I believe at that point he
25 was new to the organization and had been brought in -- or at

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1 least it was relayed to me he was being brought in to assist
2 with these type of issues -- and I'm reiterating the time
3 sensitivity of these issues. They'd been ongoing for a long
4 time at this point. I'm iterating, most notably at the bottom,
5 that the conversion rate on our website is just absolutely
6 tanked given the issues that customers are experiencing there.

7 **Q.** What was your conversion rate before you switched to
8 NetSuite?

9 **A.** We had roughly a half percent conversion rate.

10 **Q.** Okay.

11 **A.** Ten times greater.

12 **Q.** It refers to Google -- or you refer to Google analytics.
13 What is that?

14 **A.** Google analytics is an industry standard tool that
15 assesses, you know, any website. It will tell you revenue,
16 page speed times, all the metadata behind the website.

17 **Q.** And does that keep an accurate record of a company like
18 Grouse River?

19 **A.** It does if it's connected to Google analytics, yes.

20 **Q.** And were you connected to Google analytics?

21 **A.** Our site was eventually connected to Google analytics
22 after the NetSuite implementation fixed the Go-Live issues that
23 they had with it.

24 **Q.** And did you do any work on Google analytics to see what
25 was happening to your website?

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1 **A.** Yes, I did.

2 **Q.** What did you find?

3 **A.** I found the issues that we have discussed here today with
4 regards to page speed time, the plummeting conversion rates,
5 and server response time.

6 **Q.** Okay. Was this an accurate description of your NetSuite
7 website at the time?

8 **A.** Yes, it was.

9 **Q.** Let's turn to the first page of this document. There's an
10 e-mail on June 6, 2014, at 11:17 a.m. from Mr. Chaurasia to
11 Andy Lloyd. Do you know who Andy Lloyd is?

12 **A.** I believe he was in charge of products at NetSuite.

13 **Q.** Okay. He writes (reading) :

14 "Let's talk about it this next week. I'm watching
15 this trend all over the place, but we will fix it."

16 Did they fix it?

17 **A.** No, they did not.

18 **Q.** Let's go back and read the paragraph that we just looked
19 at before.

20 **TECH ASSISTANT:** This one?

21 **MR. KIEVE:** Yes.

22 **Q.** Let's go bullet by bullet point. What does it say here?

23 (reading)

24 "Customers cannot complete checkout with the only
25 message being 'We've experienced an internal error.'"

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1 What was happening there?

2 **A.** This is very similar to the experience that I just showed
3 on that demonstrative except that occasionally the site would
4 actually tell that there was actually an error. It wouldn't
5 just be a blank screen, but they would get an error.

6 **Q.** And then it says (reading) :

7 "Customers are not presented with a shipping option
8 at all. Only in-store pickup."

9 And what happened there?

10 **A.** This is a double frustration. Essentially we had the
11 in-store pickup option available on the website, but the POS
12 could not support it when the customer came to pick up the
13 items in the store. Additionally, when customers were trying
14 to checkout on the website, they would not be presented with
15 any shipping option at all; just the in-store pickup option on
16 the website.

17 **Q.** And did the in-store option actually work?

18 **A.** No, it did not.

19 **Q.** Until you sued NetSuite, did NetSuite ever deny this?

20 **A.** No, they did not.

21 **Q.** Let's go back to the point where Mr. Chaurasia writes to
22 Mr. Lloyd (reading) :

23 "Let's talk about this next week. I'm watching this
24 trend all over the place."

25 Did NetSuite ever tell you that this was a problem with

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1 its system?

2 **A.** No, it did not.

3 **Q.** Did they ever tell you that this same problem is affecting
4 other people?

5 **A.** No, they did not.

6 **Q.** What did they tell you?

7 **A.** They told us we were going to get it fixed.

8 **Q.** Did they tell you it was a Grouse River problem?

9 **A.** In some cases, they tried to indicate that it was a
10 problem with our images in terms of the page speed times. We
11 held some calls with some specialists in their department
12 regarding that who encouraged us to condense our images, so we
13 did. The result was that the pages got slower, not faster.

14 **Q.** Are you familiar with a company called Explore Consulting?

15 **A.** I am.

16 **Q.** What is it?

17 **A.** It's a company we contracted to try and help us identify
18 some of these issues and resolve them.

19 **Q.** Okay. Did you have any information from
20 Explore Consulting that NetSuite knew its system did not work
21 when it sold you its retail solution?

22 **A.** They did tell us that NetSuite was aware of the reference
23 checkout issue on the version that they had sent us live with,
24 and that all customers on that version who were checking out --

25 **MS. RAY:** Objection, Your Honor.

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1 **THE WITNESS:** -- were having that issue.

2 **THE COURT:** What's the objection?

3 **MS. RAY:** Hearsay.

4 **THE COURT:** He's saying what NetSuite told him.

5 **MS. RAY:** No. He's saying what Explore Consulting
6 told him.

7 **THE COURT:** Okay. Explore Consulting told him.

8 Do you want to respond to that? It sounds like it's
9 hearsay to me.

10 **MR. KIEVE:** Not for the truth of the matter. Just
11 what he was told.

12 **MS. RAY:** It is for the truth of the matter.

13 **THE COURT:** Yeah, it is. What's that? It's for the
14 truth of the matter. It's hearsay.

15 **MR. KIEVE:** Withdrawn.

16 **THE COURT:** Okay.

17 **MR. KIEVE:** Do you want to instruct the jury on that?

18 **THE COURT:** Yes. So -- well, let me get my special --
19 I have an instruction on that. Let me just give you my
20 instruction -- my jury instructions during trial.

21 Okay. Also, in any event, so what I've basically done is
22 there was reference to an exhibit. I said it can't come in and
23 so I'll just ask you to disregard it.

24 And, Mr. Kieve, you can resume your questioning.

25 **MR. KIEVE:** Just disregard his answer not anything

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1 else?

2 **THE COURT:** Yes. Just disregard his answer, exactly.

3 **MR. KIEVE:** Thank you.

4 **Q.** Please take a look at Trial Exhibit 141. Please pull up
5 the first page. Can we blow that up?

6 This is an e-mail dated July 13, 2015. You sent it out --
7 who are the people to whom you're sending this?

8 **A.** Essentially a number of core individuals in our
9 organization.

10 **Q.** And then --

11 **MS. RAY:** Objection, Your Honor.

12 **THE COURT:** So this is an e-mail dated July 13, 2015,
13 and the objection is hearsay objection?

14 **MS. RAY:** Correct.

15 **THE COURT:** Okay. So, Mr. Kieve?

16 **MR. KIEVE:** I think they put it on their exhibit list
17 of documents they're going to cross-examine him on.

18 **THE COURT:** I appreciate that, but they're able to
19 cross-examine him as a party opponent statement, but you
20 can't -- and he can answer any questions on cross-examination,
21 but you can't offer it --

22 **MR. KIEVE:** All right.

23 **THE COURT:** -- not for the truth.

24 **MR. KIEVE:** I will let Ms. Ray --

25 **THE COURT:** If it comes up.

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1 **MR. KIEVE:** -- examine him on that.

2 **THE COURT:** Exactly.

3 **BY MR. KIEVE:**

4 **Q.** As of July 13, 2015 --

5 **MS. RAY:** Can we --

6 **THE COURT:** Just take down the exhibit.

7 **MS. RAY:** Can we take it down, please.

8 **THE COURT:** I instruct the jury to disregard it.

9 So I'll just give you a little evidence primer.

10 So basically witnesses can talk about what they know, what
11 they see, what they hear. Those are called facts. Usually,
12 sometimes -- and usually that's just reporting of what
13 happened. They usually can't talk about what they said in the
14 past except in limited circumstances.

15 So, in any event, the lesson here is when I tell you to
16 disregard an exhibit that you've seen, I just ask you to erase
17 it from your memory. And sometimes it comes in for limited
18 purposes, and I'll let you know when that happens too.

19 Okay.

20 **MR. KIEVE:** Thank you, Your Honor.

21 **Q.** As of July 13, 2015, what was the state of Grouse River's
22 business with respect to both transactions and eCommerce
23 revenue over the previous year?

24 **A.** We'd been hurt very badly. It was about three, three and
25 a half months after our Go-Live and, as you've seen from the

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1 communication that I sent out to NetSuite, our business had
2 been dramatically impacted in a downturn fashion from the
3 impact of the launch of the eCommerce platform on NetSuite.

4 Q. Were you able to persevere?

5 A. Yes. We did everything we could to persevere, absolutely.

6 Q. And did you, in fact, increase your eCommerce revenues?

7 A. At points, yes.

8 Q. How?

9 A. We abandoned the idea that customers were going to be able
10 to self-navigate in the way that we wanted to so we got very
11 aggressive in e-mail marketing campaigns sending direct e-mails
12 to customers with direct links to purchase products at
13 discounted rates.

14 Q. Okay. Now, you testified that you hired consultants and I
15 think Ms. Ray mentioned in her own opening statement that in
16 July you also did so. Maybe not the date.

17 What did you do to try and solve the NetSuite problem?

18 A. Well, we -- that's a broad question. We -- we looked at a
19 number of consultants and gathered their input, applied their
20 recommendations. The image size is one -- was one that came in
21 that we attacked.

22 We looked at what I just described there, how could we
23 market differently, how could we go and attract customers to
24 purchase products directly versus having to navigate the
25 website.

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1 **Q.** Did you hire a Mr. Chris Szczepko, S-Z-C-Z-E-P-K-O?

2 **A.** Yes, we did.

3 **Q.** And who was he?

4 **A.** He was a consultant that had priority commerce experience
5 and we asked him to come in and take a look at some of the
6 website issues.

7 **Q.** Did he prepare a report for you?

8 **A.** He did, yes.

9 **MR. KIEVE:** Okay. I'd ask Ms. Ray if she's going to
10 object to my offering it.

11 **MS. RAY:** I am.

12 **MR. KIEVE:** Fine.

13 **Q.** She will ask you some questions about that I'm sure.

14 **A.** That will be fine.

15 **Q.** Before you went live with NetSuite -- first of all, are
16 you familiar with a term called "keyword stuffing"?

17 **A.** Yes.

18 **Q.** What is it?

19 **A.** The general concept would be to add a lot of back-end
20 keywords to a product in an effort to have it turn up higher
21 end search results.

22 **Q.** Okay. Was that a problem with the Grouse River website?

23 **A.** No. It had never been a problem with the Grouse River
24 website.

25 **Q.** Was it a problem prior to the time that you went live with

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1 NetSuite?

2 **A.** No.

3 **Q.** Was it a problem after you went live?

4 **A.** No.

5 **Q.** Okay. What effect, if any, did your experience with the
6 NetSuite retail solution have on your employees?

7 **A.** I would say it was devastating. The workload was off the
8 charts in terms of trying to mitigate the damages. It was
9 demoralizing. There had been a year of effort put forth to get
10 to Go-Live. Everybody was anticipating an improvement to
11 virtually all aspects of our business from this platform, and
12 it delivered exactly the opposite.

13 **Q.** Okay. Did you bring on a fellow by the name of Ryan Wuest
14 to help you?

15 **A.** Ryan Wuest, yes.

16 **Q.** Tell me what his job was.

17 **A.** I brought him in as an in-house person to really evaluate
18 all aspects of the platform as well as our commerce business as
19 a whole. He was an extremely experienced individual in both
20 eCommerce and marketing, had worked for Amazon and a number of
21 other large organizations.

22 **Q.** And was he helpful?

23 **A.** Yes, very much so.

24 **Q.** Did you have meetings with him?

25 **A.** Did I have meetings with Mr. Wuest?

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1 **Q.** Yes.

2 **A.** Yes, extensive ones.

3 **Q.** When you conducted an employee survey, what did you find?

4 **A.** We conducted employee surveys to evaluate the health of
5 our organization. As you saw from our mission statement
6 yesterday, it was a critical component from my leadership style
7 to ensure that we had a good workplace; and we found, after we
8 launched the NetSuite platform, that there was an extreme
9 decline in employee morale.

10 **Q.** Did you prepare an employee morale survey around
11 April 30th of 2015?

12 **A.** Yes, I believe we did.

13 **Q.** What did you find?

14 **A.** There's a high-level of dissatisfaction with communication
15 in the organization, workload, and a lot of other items.

16 **Q.** To what do you attribute this?

17 **A.** We had spent a year trying to implement this software. It
18 went live. It was disastrous. We were scrambling and it was
19 very challenging for all of our employees.

20 **MR. KIEVE:** Are you going to object to the employee
21 morale survey?

22 **MS. RAY:** Yes.

23 **MR. KIEVE:** Thank you.

24 **Q.** She will ask about that.

25 In her opening statement, Ms. Ray said that she would show

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1 the jury deposition testimony of Mr. Troy Hill that he was not
2 aware of any false statements by NetSuite. Do you have an
3 explanation for that?

4 **MS. RAY:** Objection.

5 **THE COURT:** Foundation? Is your objection on
6 foundation?

7 **MS. RAY:** Yes, it is, Your Honor.

8 **THE COURT:** Okay. Why don't you lay some -- I'll
9 sustain the objection but allow you to lay some foundation.

10 **BY MR. KIEVE:**

11 **Q.** Did you attend his deposition?

12 **A.** Yes. I was at Mr. Hill's deposition.

13 **Q.** Would you explain why Mr. Hill would not be in a position
14 to testify that he was not aware of any false statements by
15 NetSuite?

16 **THE COURT:** If you know.

17 **BY MR. KIEVE:**

18 **Q.** If you know.

19 **A.** I could say that his deposition was over four years after
20 his involvement with the NetSuite project and the statements
21 they were making there and well over two years, I believe,
22 after he left Grouse River as an organization. I don't know
23 what his recollection would be after that period of time.

24 **Q.** Ms. Ray said that she would show the jury the videotaped
25 deposition of Kristen Harder that she was not aware of any

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1 false statements.

2 **THE COURT:** Mr. Susman is summoning you.

3 (Counsel conferring.)

4 **BY MR. KIEVE:**

5 **Q.** Let me repeat my question.

6 In her opening statement, Ms. Ray said that she would show
7 the jury testimony from Kristen Harder that she was not aware
8 of any false statements by NetSuite. Do you have an
9 understanding of why she would testify to that?

10 **MS. RAY:** Objection.

11 **THE COURT:** Objection on foundation grounds sustained.

12 **BY MR. KIEVE:**

13 **Q.** Was Ms. Harder in a position, to your knowledge, to know
14 whether NetSuite would or would not have made false statements?

15 **A.** Ms. Harder was not a part of our precontract discussions
16 with NetSuite. I don't know how she would know what statements
17 were made or not during that period.

18 **Q.** Ms. Ray also said that she would show the jury a
19 videotaped deposition of Maciek Wronski that he was not aware
20 of any false statements by NetSuite. Do you have any
21 understanding whether or not Mr. Wronski was aware of any false
22 statements by Ms. Ray?

23 **MS. RAY:** Objection to the extent he's
24 mischaracterizing my opening.

25 **THE COURT:** Okay. So objection sustained.

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1 Why don't you reask the question.

2 **BY MR. KIEVE:**

3 Q. Was Mr. Wronski, to your knowledge, aware of any false
4 statements by NetSuite?

5 A. I believe he was, yes.

6 Q. Why?

7 **MS. RAY:** Objection. Foundation.

8 **THE COURT:** Well, let's -- how do you know?

9 **BY MR. KIEVE:**

10 Q. How do you know?

11 A. Mr. Wronski was involved in our precontract discussions to
12 an extensive degree. He managed our purchasing departments and
13 was part of the deployment of the product in that area and had
14 extensive concerns about what NetSuite was delivering versus
15 what he saw in those presentations.

16 **MS. RAY:** Objection.

17 **THE COURT:** Grounds?

18 **MS. RAY:** To the "extensive concerns." He's just
19 telling us what Mr. Wronski thought.

20 **MR. KIEVE:** If he expressed it to him.

21 **MS. RAY:** I don't believe he laid any foundation for
22 that.

23 **THE COURT:** Okay. So objection sustained in part.
24 The testimony is fair about what his roles in the contracts
25 were. You can only testify about what he heard if you know

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1 what he heard because you were there.

2 **MR. KIEVE:** Yes.

3 **THE COURT:** Okay. So what I'm going to do is I'm
4 going to sustain the objection and allow you to reask the
5 question, and I suggest that you do it by reference to what his
6 role was in the process.

7 **BY MR. KIEVE:**

8 **Q.** What was Mr. Wronski's role in the process?

9 **A.** Mr. Wronski was an integral part of our evaluation
10 process. He had software background experience, had worked
11 with our company for a number of years, understood, you know, a
12 good combination of elements that were going to go into this
13 project, and was a part of the implementation process in his
14 area of the organization.

15 **Q.** And did he experience firsthand the same problems that you
16 experienced?

17 **A.** Yes.

18 **THE COURT:** If you know.

19 **BY MR. KIEVE:**

20 **Q.** If you know.

21 **A.** I do know, and he did.

22 **THE COURT:** And how do you know that?

23 **THE WITNESS:** I would have had extensive conversations
24 with Mr. Wronski about this and communicated with him about it
25 in person as well as through e-mail.

1 BY MR. KIEVE:

2 Q. Thank you.

3 There was an individual by the name of Kevin Rost who
4 worked with you; correct?

5 A. Correct.

6 Q. What did he do?

7 A. Kevin was brought in to be the NetSuite system
8 administrator. We had committed to hiring one at the time we
9 contracted with NetSuite, and he was brought in for that role.

10 Q. Was NetSuite aware that you were going to hire a specific
11 person for that job?

12 A. Yes, they were.

13 Q. Was NetSuite aware when you contracted with them that you
14 did not have one on the spot right then?

15 A. Yes, they were aware.

16 Q. And were they aware of the timetable by which you would
17 hire him?

18 A. We were looking to find an appropriate person as soon as
19 we could.

20 Q. Did the delay in hiring Mr. Rost delay the implementation?

21 A. I believe we held back the initial kickoff of the
22 implementation while we were hiring for that role, yes.

23 Q. And NetSuite knew that?

24 A. Yes, they did.

25 Q. That was part of the deal?

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1 **A.** Yes, it was.

2 **Q.** Okay. How did Mr. Rost do?

3 **A.** He did very well. He came in, managed virtually all the
4 meetings that needed to occur with NetSuite, centralized the
5 communication from our organization to NetSuite. He
6 facilitated all those meetings and the implementation process
7 across organization through Go-Live; and I believe after that,
8 he was overwhelmed by the number of issues that came from the
9 system.

10 **Q.** Did there come a time when you terminated him?

11 **A.** We did.

12 **Q.** Why?

13 **A.** It had been a year and a half or more since we had
14 launched the system. There was no end to the issues that
15 NetSuite said they were going to fix. We felt our best course
16 of action was to reduce the overhead related to the system and
17 use some outside contractors along with other individuals in
18 our organization to continue to operate.

19 **Q.** Okay. Were there times when you expressed frustration
20 with your own employees?

21 **A.** Absolutely.

22 **Q.** Were there times where you expressed frustration with
23 Mr. Rost?

24 **A.** Sure.

25 **Q.** How did that impact your overall view of Mr. Rost?

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1 **A.** It didn't necessarily impact my overall view of Mr. Rost.
2 I felt he did a very good job with what he was tasked to do on
3 the NetSuite implementation.

4 **Q.** Was Grouse River's part of the implementation perfect?

5 **A.** No.

6 **Q.** What issues did you have internally?

7 **A.** We would have issues allocating certain resources in
8 certain periods of time. We'd certainly need time to get back
9 on certain issues depending on when those issues were coming
10 up. We had employees lead the organization at times like any
11 organization does.

12 **Q.** Okay. I'd like to take a look at Exhibit Number 116.

13 This is an internal e-mail that you sent to your employees
14 January 15th, 2016.

15 What was the state of your business?

16 **MS. RAY:** Objection.

17 **MR. KIEVE:** I've not offered it yet.

18 **THE COURT:** Okay.

19 **MS. RAY:** Well, it's on the screen.

20 **THE COURT:** Don't put it on the screen until we --

21 **MR. KIEVE:** Sorry.

22 **THE COURT:** Yeah. So it's Exhibit 116.

23 **MR. KIEVE:** Okay.

24 **Q.** This is an e-mail that you sent out to employees as of
25 January 15th, 2016. Do you recall sending an e-mail out to

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1 your employees on that date talking about what they were doing
2 and what they're not doing.

3 **A.** I do recall the general nature of that, yes.

4 **Q.** And what were you trying to do in that e-mail?

5 **A.** I was trying to call out that we needed to focus on the
6 responsibilities that were within our control to motivate them
7 to do that.

8 **Q.** Okay. What was the major problem as of that date? Was it
9 not -- was it motivation or something else?

10 **A.** No. I mean, the major problem as of that date was the
11 impact from the NetSuite system. We were trying to overcome it
12 in any way, shape, or form that we could.

13 **Q.** What was your cash flow situation at that time?

14 **A.** It was terrible.

15 **Q.** Why?

16 **A.** We'd been on the NetSuite platform --

17 **MS. RAY:** Objection, Your Honor.

18 **THE COURT:** So he can -- I mean, again, these are fact
19 issues. Keep it to the facts. Describe the facts. Don't draw
20 conclusions about causation, but you can describe the facts
21 with particularity --

22 **MR. KIEVE:** Yes.

23 **THE COURT:** -- and ask all the questions you want
24 about other variables.

25 **MR. KIEVE:** Correct.

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1 **THE COURT:** Okay.

2 **BY MR. KIEVE:**

3 **Q.** What were the variables that impacted your cash flow as of
4 January 2016?

5 **A.** We had been on the NetSuite platform for about nine months
6 at that period of time. It had created our eCommerce
7 business. It had led to an immense amount of inefficiency
8 throughout our organization. We were having to offset the
9 decline in sales by injecting additional capital into the
10 organization.

11 **Q.** What was the effect upon your inventory visibility?

12 **A.** The inventory visibility after we launched NetSuite was
13 hindered by the fact that transactions weren't reconciling back
14 to the system, which meant that a sale could go through and the
15 inventory would not be removed from our system. The cycle
16 counting ability of the product itself was limited in terms of
17 our ability to update by item. And we were hindered in our
18 ability to get an accurate view of that inventory for those
19 reasons and some more.

20 **Q.** Do you recall sending an e-mail to your employees on or
21 around March 1st, 2016, discussing benefit changes?

22 **A.** Yes, I do.

23 **Q.** Why did you send that e-mail?

24 **A.** Again, we were trying to look at how we could cut costs in
25 our organization after a year of the detriment from

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1 implementing the system, and I was sending an e-mail out saying
2 that we were going to cut some benefits.

3 **Q.** What did you do to try to solve the problems here?

4 **A.** Everything we could.

5 **Q.** Did you look for additional financing to keep afloat?

6 **A.** We did, yeah.

7 **Q.** What did you do in that respect?

8 **MS. RAY:** Objection, Your Honor.

9 **THE COURT:** What's the ground for the objection?

10 **MS. RAY:** We have no evidence that they looked for any
11 additional financing. They did not turn over any evidence on
12 this point.

13 **THE COURT:** Okay.

14 **MS. RAY:** This is a spoliation motion.

15 **BY MR. KIEVE:**

16 **Q.** Did you --

17 **THE COURT:** Well, is there a documentary record that
18 supports the testimony?

19 **MR. KIEVE:** Yes. Let me rephrase the question.

20 **THE COURT:** I mean, because if there are --

21 **BY MR. KIEVE:**

22 **Q.** Did you --

23 **THE COURT:** -- exhibits that weren't produced, they
24 can't be used. Acts he took can be testified to.

25 **MS. RAY:** Even if the evidence that would allow us to

1 test that testimony is not available because they did not
2 produce it even though it was requested?

3 **THE COURT:** Well, so here's the issue that we talked
4 about. You know, I don't know what the evidence --

5 **MR. KIEVE:** I'll withdraw the question.

6 **THE COURT:** Okay. That's fine. Okay.

7 If it's in the CRM database that you have, that's another
8 issue.

9 **MS. RAY:** It's not.

10 **THE COURT:** And if it's not, then you can't inquire
11 about it. Okay.

12 **BY MR. KIEVE:**

13 **Q.** Did you obtain additional funds to keep the company
14 afloat?

15 **A.** We did. We injected additional capital to keep the
16 company afloat.

17 **Q.** When you say "we," who?

18 **A.** Our family.

19 **Q.** How much?

20 **A.** The end result was about \$3 million.

21 **Q.** Did that work?

22 **A.** No, it did not.

23 **Q.** Why not?

24 **A.** The time that we --

25 **MS. RAY:** Objection, Your Honor.

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1 **THE COURT:** Okay.

2 **MS. RAY:** I don't know exactly what "did that work"
3 means, but I found, like, that was also calling for causation
4 testimony.

5 **MR. KIEVE:** It's a fuzzy question. I'll withdraw it.

6 **THE COURT:** All right. Objection sustained.

7 **BY MR. KIEVE:**

8 **Q.** Were the injection of the additional \$3 million in funds
9 from your family able to keep Grouse River afloat?

10 **A.** No, it was not.

11 **Q.** What did you do with those additional funds?

12 **A.** We bought inventory, we reduced our bank debt, and used it
13 as working capital to offset the damages.

14 **Q.** Did you pay off all your bank debt?

15 **A.** Yes, we did eventually.

16 **Q.** Okay. Does Grouse River owe anyone else any money today?

17 **A.** We owe a little bit of money to our landlord still.

18 **Q.** Okay. Do you intend to pay the former landlord if you
19 can?

20 **A.** Yes. I would like to.

21 **Q.** Do you intend to repay your mother if you can?

22 **A.** Absolutely.

23 **Q.** Okay. What are the reasons that you're suing Oracle at
24 this point?

25 **A.** In short, because I feel that what was sold to us was

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1 misrepresented completely, that it was hidden from us; that
2 when we asked to see a resolution for that, that there was no
3 resolution provided either in terms of a fix of the product,
4 any assistance, or compensation for what happened.

5 **Q.** Did you hire additional consultants to help you?

6 **A.** We did.

7 **Q.** Did you hire Grant Thornton?

8 **A.** Yes. Grant Thornton was our accounting firm, and we
9 brought them in to evaluate this.

10 **Q.** Okay. Did they give you a report?

11 **A.** They did.

12 **Q.** At the end of 2015, what impact, if any, did these
13 failures in the NetSuite software have on Grouse River's
14 business?

15 **MS. RAY:** Objection.

16 **THE COURT:** The objection is on a causation, but he
17 could -- he can report -- so objection sustained as to
18 causation, but he can report the state of the business at the
19 time.

20 **MS. RAY:** Can he rephrase the question so that the
21 record is clean because he's tied it directly to --

22 **THE COURT:** So rephrase the question. What was the
23 state of your business in the time period? Yeah.

24 **BY MR. KIEVE:**

25 **Q.** What was the state of your business at the end of 2015?

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1 **A.** It was very stressed. As I think I've described in your
2 past questions here, we were injecting capital. We were trying
3 to offset the sales downturn that had happened since we
4 launched this system.

5 **Q.** Did you ask NetSuite to help solve these problems?

6 **A.** Repeatedly.

7 **Q.** Who did you ask?

8 **A.** Anyone I could. We talked to sales, we talked to
9 professional services; and, as you saw, we escalated to the
10 executive level.

11 **Q.** The executive meaning Zach Nelson, the president and CEO?

12 **A.** Yes, and others.

13 **Q.** What did you ask Mr. Nelson to do?

14 **A.** As you saw, I asked him to lend the support that was
15 necessary to deliver the project as we'd contracted and paid
16 for it.

17 **Q.** And what did he say?

18 **A.** At that point in time end of 2015, he had asked us to
19 continue with another renewal and pay for that and that he
20 would discuss these issues.

21 **Q.** Did you pay for the other renewal?

22 **A.** I wired him the funds the next day.

23 **Q.** What happened after that, if anything?

24 **A.** I never heard from him again.

25 **Q.** Did anyone else at NetSuite contact to try and help you?

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1 **A.** Yes. We were contacted by other individuals.

2 **Q.** Did that work?

3 **A.** No, it did not.

4 **Q.** Okay. Did you receive other reports from other companies,
5 such as Innoday?

6 **A.** Yes.

7 **Q.** What did -- did they attribute -- never mind.

8 Why did you seek out help from Innoday?

9 **A.** One of the recommendations that had come from one of the
10 reports was to configure our checkout --

11 **MS. RAY:** Objection.

12 **THE COURT:** So the question is: Why did you seek out
13 help from Innoday? So that question is fine. That question is
14 fine. So the objection is overruled, but listen to the
15 question and answer the question because your concern is about
16 the answer.

17 So why don't you -- so the question was -- why don't you
18 restate the question again, which is: Why did you seek out
19 help from -- so ask your question again.

20 **BY MR. KIEVE:**

21 **Q.** Why did you seek out help from Innoday?

22 **A.** One of the reports that you mentioned earlier had
23 discussed the idea of moving to a one-page checkout as a way to
24 alleviate some of the customer frustrations from checkout
25 log-in that was occurring on the NetSuite platform. They

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1 helped us do that along with the reporting on a number of other
2 things on the eCommerce especially, and we used them to help
3 do that checkout migration.

4 **Q.** Okay. Could we please pull up Demo 1.

5 **THE COURT:** I want to just say one thing for the
6 record. So my restrictions about testimony, it's just meant
7 to -- to the extent Mr. Fallis has fact information about his
8 business, he can fairly report every fact about his business
9 that he knows.

10 **MR. KIEVE:** You have been very helpful, Your Honor.

11 **THE COURT:** Okay. So I just want to make it very
12 clear there's a lot he can talk about.

13 **MR. KIEVE:** I understand.

14 **THE COURT:** Okay. It's the ultimate conclusion
15 sometimes that often people by discussing every single variable
16 can show the context.

17 Okay. So let's leave it at that.

18 So Demo 1, please.

19 **BY MR. KIEVE:**

20 **Q.** This is the chart we showed you at the beginning of your
21 testimony entitled "Fraudulent Statements that Induced
22 Grouse River to Sign Contract with NetSuite."

23 You've gone over your testimony. Does your testimony
24 cover each one of these statements?

25 **A.** Yes, it does.

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1 **MS. RAY:** Objection. The record speaks for itself.

2 **THE COURT:** Well, I'll overrule the objection. The
3 jurors' view of the evidence, whether -- you are the people who
4 gets to decide whether the evidence shows -- meets each of the
5 standards. The witness' belief that he may or may not have
6 testified as to each of the elements is just that, and you are
7 the ones who will decide what the evidence is.

8 **BY MR. KIEVE:**

9 **Q.** What would you have done if you had learned the truth?

10 **A.** We would never have entered any contract with NetSuite.

11 **Q.** Did the NetSuite software have any economic impacts on
12 your business?

13 **A.** Extreme ones, yes.

14 **Q.** Have you prepared a chart showing this?

15 **A.** Yes, we have.

16 **MR. KIEVE:** I'd like to put the demonstrative up.

17 **THE COURT:** Have we seen the demonstrative?

18 **MS. RAY:** No.

19 **THE COURT:** I was super clear that demonstratives need
20 to be exchanged up front.

21 **MR. KIEVE:** We did.

22 **THE COURT:** They're saying that they have not see the
23 demonstrative.

24 **MS. XI:** Yes. It's the damages chart demonstrative
25 that was given to you on July 4th.

MS. RAY: On July 4th.

MS. XI: Yeah.

MR. KIEVE: No. We gave them the other ones too.

MS. XI: It's a demonstrative.

MR. KIEVE: It's a demonstrative anyway.

MS. RAY: Can we grab a sidebar on this, Your Honor?

THE COURT: It's a little difficult. Can we just look

MS. RAY: Up here?

THE COURT: Oh, no, no. A hard copy, please. A hard
e'll have a look at it.

So just for the jury's edification, sometimes people get to use sort of outlines they show you so you can see what they're talking about, and I haven't seen this yet so I don't know if that's okay.

Please show Ms. Ray first.

(Pause in proceedings.)

THE COURT: So as long as you cover with testimony each of the points that are admissible, you can use whatever demonstrative you want in closing so long as you show it to -- as argument as long as you share it in advance with each other. Okay? So that will take care of your argument points. Just go through the points.

MR. KIEVE: Thank you.

THE COURT: Perfect.

FALLIS - DIRECT / KIEVE

1 BY MR. KIEVE:

2 Q. All right. How much did you pay NetSuite?

3 A. Roughly \$405,000.

4 Q. Are you claiming this as damages?

5 A. Yes.

6 Q. Did you pay anyone else?

7 A. We did.

8 Q. Who did you pay?

9 A. We hired the partners and consultants that we have
10 mentioned here.

11 Q. And how much was that?

12 A. Roughly \$160,000.

13 Q. Okay. Are you claiming additional damages?

14 A. We are.

15 Q. Are you claiming damages for lease expenses related to the
16 project?

17 A. We are. We had leased an additional space that was
18 supposed to support as a second location. As I indicated
19 earlier, the software was going to support a distribution
20 center and delivery to stores.

21 Q. And how much is that?

22 A. Roughly \$200,000.

23 Q. Okay. Are you claiming this as damages?

24 A. Yes, we are.

25 Q. What is the total amount of compensatory damages you're

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1 claiming at this time in this lawsuit?

2 **A.** It's about \$766,000.

3 **Q.** Has Grouse River been damaged in other ways?

4 **A.** We have.

5 **Q.** How?

6 **MS. RAY:** Objection, Your Honor.

7 **THE COURT:** So objection sustained as to the word
8 "damages." And also I query whether you've already asked all
9 those questions.

10 The damages are as they've been defined as the
11 compensatory damages that Mr. Fallis just --

12 **MR. KIEVE:** There's a difference between having
13 suffered damages and --

14 **THE COURT:** Harm. Use the word "harm."

15 **MR. KIEVE:** Good idea.

16 **THE COURT:** Yeah.

17 **BY MR. KIEVE:**

18 **Q.** Has Grouse River been harmed in other ways?

19 **A.** Yes, absolutely.

20 **Q.** How?

21 **A.** We put our entire business through hell with this system
22 and -- pardon my language --

23 **MS. RAY:** Objection, Your Honor.

24 **THE WITNESS:** -- it cost us an extreme amount of money
25 to try and overcome that.

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1 **MR. KIEVE:** Thank you.

2 **THE COURT:** Objection overruled.

3 **BY MR. KIEVE:**

4 **Q.** What was your sustained growth as of the time that you
5 went live with NetSuite?

6 **A.** We had never grown less than 23 percent per year.

7 **Q.** And what was your revenue in that year?

8 **A.** \$7.2 million.

9 **Q.** Why aren't you claiming damages for this?

10 **MS. RAY:** Objection, Your Honor.

11 **THE COURT:** Yeah. As a relevance objection and also
12 cabined by the Court's previous rulings?

13 **MR. KIEVE:** Got it.

14 **THE COURT:** Okay. Objection sustained.

15 **BY MR. KIEVE:**

16 **Q.** Are you asking the jury to award you anything else?

17 **A.** Yes. We would ask that there be punitive damages for
18 what's happened here.

19 **Q.** Why?

20 **A.** Because NetSuite lied to us in terms of what they
21 represented they could do. It had an extreme impact on our
22 company, our employees, our finances, and I believe that's
23 just.

24 **Q.** Is there any component of the fact that you thought you
25 were a guinea pig?

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1 MS. RAY: Objection, Your Honor. Leading.

2 THE WITNESS: Yes. I believe that NetSuite benefited
3 at our expense.

4 THE COURT: So it's technically leading, but I'll
5 overrule the objection because it's form of the question and
6 that's fine.

7 BY MR. KIEVE:

8 Q. What amount of punitive damages are you asking the jury to
9 award?

10 A. We would like to consider the entire amount of injury that
11 was brought into our company and our company was valued at
12 least \$7.2 million.

13 MS. RAY: Objection, Your Honor.

14 THE COURT: Objection sustained.

15 MR. KIEVE: Sorry. I didn't mean for him to go there.

16 THE COURT: Okay. I understand.

17 The jury is instructed to disregard the answer.

18 MR. KIEVE: Okay.

19 Q. What amount are you seeking without mentioning an amount?

20 THE COURT: Well, you can mention an amount I guess,
21 but you can't tether it to anything other than an ask. I don't
22 think you -- you can ask for the amount whatever you ask for in
23 closing. That's fine.

24 Okay. So objection sustained.

25 All right. Anything else?

MR. KIEVE: Tender the witness.

THE COURT: Okay. That's great. Thank you.

So cross-examination.

MS. RAY: Can you just tell me how much time before we take a break so I can --

THE COURT: We have 35 to 40 minutes.

MS. RAY: Okay.

THE COURT: Do you have an idea of how long you'd like to cross-examine?

MS. RAY: Um --

THE COURT: That's all right --

MS. RAY: Given my track record on this point --

THE COURT: Yeah, just ballpark.

MS. RAY: -- I think maybe an hour 45.

15 **THE COURT:** Okay. All right. So let's go take the
16 first crack at it, and we'll take a break in about 35 or 40
17 minutes.

MS. RAY: Binders?

MR. KIEVE: I have a question. I can't see him.

THE COURT: Maybe you guys can switch places.

And you're welcome to use this podium. That's a better one. Get yourself organized there, but that's fine.

MS. RAY: Thank you.

(Pause in proceedings.)

MS. JOVAIS: May I approach, Your Honor?

THE COURT: Yes, thank you.

(Pause in proceedings.)

MS. RAY: Is it morning or afternoon? It's afternoon.

THE COURT: It's afternoon.

MS. RAY: It's afternoon.

THE COURT: Yes.

CROSS-EXAMINATION

BY MS. RAY:

Q. Good afternoon, Mr. Fallis.

A. Good afternoon.

Q. How are you?

A. I'm good. How are you?

Q. We've met before?

A. Yes, we have.

Q. You sat for a deposition in April or May of this year; correct?

A. Around then, yes.

Q. That was the first time we met.

Okay. And that was up in Vancouver; right?

A. Correct.

Q. As you know, I represent NetSuite in this case.

Now, you stated earlier in your testimony that

Grouse River was founded in 2007; correct?

A. Correct.

Q. And it started operating a website grouseriver.com in

1 2008?

2 **A.** Correct.

3 **Q.** And you opened a brick-and-mortar store in Kelowna in 2008
4 also; correct?

5 **A.** That's correct.

6 **Q.** And at that time Kelowna had a population of about 120,000
7 people; is that right?

8 **A.** The immediate area of the city, yes, I think that's right.

9 **Q.** Okay. And you testified that when Grouse River began
10 operations, it used a software called Volusion; is that
11 correct?

12 **A.** Yes.

13 **Q.** And that was to manage its online and in-store sales?

14 **A.** And inventory, yes.

15 **Q.** And then Grouse River used QuickBooks for its financial
16 accounting; correct?

17 **A.** Correct.

18 **Q.** QuickBooks is an out-of-box solution that you can purchase
19 at an office supply store; right?

20 **A.** We used various versions of it through our company's
21 history. Eventually a cloud-based version was used.

22 **Q.** Okay. But it is -- that is a correct statement, isn't it,
23 that QuickBooks is something you can actually buy off the
24 shelf?

25 **A.** I'm not certain that the version that we used could be

1 bought off the shelf.

2 **Q.** Okay. Grouse River prepared annual financial statements
3 with the assistance of a third-party accountant; correct?

4 **A.** We did.

5 **Q.** And your annual financial statements contain information
6 regarding the financial performance of your company over a
7 fiscal year; correct?

8 **A.** Yes, that's right.

9 **Q.** For example, they contain the profits that Grouse River
10 earned in any fiscal year; right?

11 **A.** That's correct.

12 **Q.** And they also would contain the amount of debt that
13 Grouse River had accumulated over that year?

14 **A.** That's correct.

15 **Q.** And let's talk for a minute about fiscal year so that the
16 jury is on the same page as the rest of us.

17 A fiscal year is the time period that is used by a
18 business for accounting purposes; right?

19 **A.** As I understand it, yes.

20 **Q.** Okay. And Grouse River had a specific fiscal year that
21 was not exactly the same as a calendar year; correct?

22 **A.** That's correct.

23 **Q.** So for Grouse River's purposes, the fiscal year ran from
24 March 1st of one year to the end of February the next year;
25 right?

1 **A.** That is correct.

2 **Q.** Okay. I think we have a demonstrative that might help
3 just to make sure we are all on the same page.

4 Can you see this?

5 **A.** Yes.

6 **Q.** You do have it there; right?

7 **A.** Yes.

8 **Q.** Great.

9 So as an example, the year that Grouse River opened its
10 flagship store is indicated right smack in the middle of the
11 blue 2013. Do you see that?

12 **A.** Yes, I do.

13 **Q.** Okay. And Grouse River opened its flagship store in the
14 middle of the calendar year 2013; right?

15 **A.** That's correct.

16 **Q.** Okay. Underneath that it shows that that is, in fact,
17 your fiscal year 2014; right?

18 **A.** That's correct.

19 **Q.** All right. So because it was in July, your fiscal year
20 started in March, and then the fiscal year is named for the --
21 basically the year, the February that the end of the fiscal
22 year falls in; right?

23 **A.** I'm sorry. What was in July?

24 **Q.** You opened the store in July. Your fiscal year that year,
25 though, began in March; correct?

1 **A.** I believe we opened the store in June of that year.

2 **Q.** Okay. Corrected.

3 So you opened the store in June. Nevertheless, it was a
4 few months after your fiscal year 2014 began; right?

5 **A.** That's correct.

6 **Q.** But, again, even though that was calendar year 2013?

7 **A.** That's correct.

8 **Q.** So we might today do a sort of hybrid where we talk about
9 the calendar year and the fiscal year in the same sentence so
10 everyone understands where we are. Does that make sense?

11 **A.** Sure.

12 **Q.** Okay. In fact, you prepared annual financial statements
13 for fiscal years 2008 through 2016; right?

14 **A.** That is correct.

15 **Q.** So we're going to talk a little bit about Grouse River's
16 profitability during its first few years.

17 Grouse River did not make a profit in its first full year
18 of operations; correct?

19 **A.** No, it did not.

20 **Q.** And Grouse River did not make a profit in its second year
21 of operations; correct?

22 **A.** No, it did not.

23 **Q.** And it didn't make a profit in its third year of
24 operations; correct?

25 **A.** I'm just counting up the years in terms of calendar years

1 here. I don't believe so.

2 **Q.** And it didn't make a profit in its fourth year of
3 operations; correct?

4 **A.** Which year was that?

5 **Q.** Fiscal year 2011.

6 **A.** No, we did not.

7 **Q.** Okay. So for the first four years that you were in
8 business, you did not make a single dollar; is that right?

9 **A.** In net profit, correct.

10 **Q.** Now, Grouse River did make a profit during its fifth year
11 of operations; correct? That would be -- actually, I think I
12 misspoke.

13 This would be fiscal year 2013, which would be calendar
14 year 2012; right?

15 **A.** The one that ended in February 2013 would be our fiscal
16 2013 and, yes, I believe we turned a profit that year.

17 **Q.** Okay. Let's look at Trial Exhibit 122 in your binder.

18 We will get you a binder. You will not be able to do this
19 without one.

20 (Pause in proceedings.)

21 **MS. JOVAIS:** May I approach?

22 **THE COURT:** Yes.

23 **BY MS. RAY:**

24 **Q.** Okay. Sorry. Again, it's Trial Exhibit 122.

25 You are free, of course, to look at what we are showing

1 you on the screen. I just want to make sure that you know you
2 have the full exhibit as well if you'd like to take a look at
3 it.

4 **A.** Okay.

5 **Q.** So for Exhibit 122, as you can see here, this is the
6 financial statements for 2014; is that right?

7 **A.** Yes, it is.

8 **Q.** So is this an example of one of the financial statements
9 that we discussed that you prepared each year to reflect your
10 profits and debts and other things?

11 **A.** This was prepared by our accountants, yes.

12 **Q.** Okay. And so taking a look, if you will, this document
13 covers both fiscal year 2014 and 2013; right?

14 **A.** There was generally a comparison year put in our financial
15 statements, yes.

16 **Q.** Okay. Great.

17 Let's turn to page 5 of this document.

18 **A.** Sorry. Page 5 of the --

19 **Q.** Yes. And when I say that, I'm going to ask you to look at
20 the sort of 5 of 14, the number at the bottom.

21 **A.** Got it.

22 **Q.** Right. And that would be the same for the rest of the
23 things we look at today. You can look at sort of the trial
24 exhibit number.

25 **MS. RAY:** I actually need a tissue. Sorry,

1 Your Honor.

2 (Pause in proceedings.)

3 **BY MS. RAY:**

4 **Q.** Okay. So if you will look, Grouse River's profits in
5 fiscal year 2013 is the column on the right. Do you see
6 that -- the column on the right reflects 2013; right?

7 **A.** That's correct.

8 **Q.** And if you look down at the bottom, the net loss income
9 for fiscal year 2013 is 212,293. Do you see that?

10 **A.** The income for 2013 is 212, yes.

11 **Q.** Okay. So that was the profit that you made in that year;
12 correct?

13 **A.** That's correct.

14 **Q.** Okay. Now, if you look to the previous page of the
15 exhibit, page 4, in fiscal year 2013, Grouse River had some
16 bank loans and debt; correct?

17 **A.** Yes, we would have had.

18 **Q.** Okay. So if you look at the bank loan there is indicated
19 as \$281,700. Do you see that?

20 **A.** Yes, I do.

21 **Q.** And do you see also above that "Payables and Accruals"?
22 Those are monies that Grouse River owes; correct?

23 **A.** Correct.

24 **Q.** Okay. And that's 507,033?

25 **A.** Yes.

1 **Q.** And then you also see that there is a "Due to
2 Shareholders." Do you see that?

3 **A.** I do.

4 **Q.** And that is 764,731?

5 **A.** Yes.

6 **Q.** Okay. So in this year when you made the \$212,000 profit,
7 you also owed about a million and a half dollars in liabilities
8 on your balance sheet; correct?

9 **A.** Correct.

10 **Q.** And that was your last full year in the small store, this
11 fiscal year 2013; correct?

12 **A.** That's correct, yes.

13 **Q.** Okay. So in that last year in your small store, you made
14 a profit, you had about a million and a half dollars of debt?

15 **A.** That's correct.

16 **Q.** Okay. Now, you started talking to NetSuite in April of
17 2013; correct?

18 **A.** Thereabouts, yes.

19 **Q.** So that's right after the close of this year that we've
20 just discussed?

21 **A.** Yes.

22 **Q.** Okay. And you told NetSuite that Grouse River was on a
23 growth trajectory, didn't you?

24 **A.** Yes, absolutely I would have said that.

25 **Q.** Okay. I believe your counsel stated in her opening

1 statement that Grouse River was enjoying tremendous growth and
2 momentum up until the point it switched to NetSuite. Is
3 that -- do you remember that statement?

4 **A.** Not specifically, but I can believe that, yes.

5 **Q.** And you agree with that?

6 **A.** Yes.

7 **Q.** In the years that you did not make a profit while you were
8 on Volusion and QuickBooks, did you blame QuickBooks and
9 Volusion for your inability to make a profit?

10 **A.** No, I did not.

11 **Q.** And did you ever sue Volusion or QuickBooks for your
12 failure to make a profit?

13 **A.** No, we did not.

14 **Q.** Now, after you did make your single profit as
15 Grouse River, you decided to open a new flagship retail store;
16 correct?

17 **A.** Yes. That had been in the plans before that point but,
18 yes.

19 **Q.** Okay. So you made that decision when you -- before you
20 had ever turned a profit; correct?

21 **A.** Correct.

22 **Q.** And you had never spoken to NetSuite when you made that
23 decision; correct?

24 **A.** That's correct.

25 **Q.** And you had not entered into a contract with NetSuite when

1 you made that decision?

2 **A.** That's correct.

3 **Q.** And you were not using NetSuite to run your business?

4 **A.** That's correct.

5 **Q.** You signed a lease for the space for the flagship retail
6 store in February 2012; isn't that right?

7 **A.** That sounds about right, yes.

8 **Q.** Okay. So are you aware that the press release that forms
9 the basis for your first misrepresentation came out in
10 May 2012?

11 **A.** Yes, that's right.

12 **Q.** So at the time that you signed the lease in February of
13 2012 for your flagship store, you had not even viewed a single
14 representation from NetSuite; correct?

15 **A.** I couldn't say that unequivocally, but certainly not one
16 that we were looking at with regards to the system that we were
17 looking to implement, yes.

18 **Q.** Right. And you signed a 10-year lease in 2012; correct?

19 **A.** That's correct.

20 **Q.** Okay. And that was for the retail space in Kelowna?

21 **A.** That's right.

22 **Q.** And at the time you decided to open the flagship store,
23 you knew that online spending was expected to increase in the
24 Canadian market; correct?

25 **A.** We anticipated that it would, yes.

1 **Q.** In fact, Grouse River's strategy was for the majority of
2 its revenue to come from online operations; isn't that right?

3 **A.** That is correct.

4 **Q.** And after you signed the lease, you began to build out
5 this flagship store; correct?

6 **A.** Yes, we did.

7 **Q.** In fact, you began building the store out in August of
8 2012; right?

9 **A.** That sounds about right.

10 **Q.** Okay. And you spent over 1 and a half million dollars
11 building and equipping the flagship store, didn't you?

12 **A.** Around there, yes.

13 **Q.** We can look back at TX122, the fiscal year 2014 financial
14 statement, and let's look at page 10. And do you see the
15 section entitled "Property and Equipment" on page 10?

16 **A.** Yes, I do.

17 **Q.** Okay. And this shows that Grouse River spent over a
18 million dollars on leasehold improvements in fiscal years 2013
19 and 2014?

20 **A.** That's correct.

21 **Q.** Okay. And Grouse River spent \$328,000 on furniture and
22 fixtures in these years?

23 **A.** That's correct.

24 **Q.** And Grouse River spent \$15,000 on signs in these years?

25 **A.** That's correct.

1 **Q.** You hired an interior designer to design the flagship
2 store; right?

3 **A.** We did.

4 **Q.** Okay. Let's look at the old store. Is this a picture of
5 the original location for Grouse River?

6 **A.** The exterior building had been modified since we were
7 there but, yes.

8 **Q.** And that's the interior obviously now is a different
9 retail environment; correct?

10 **A.** It looks like it should be, yeah.

11 **Q.** Okay.

12 **A.** It's different.

13 **Q.** And then let's look at the flagship store. And this is
14 the pictures from the store that you built out in 20 -- started
15 building out in 2012; correct?

16 **A.** That's correct.

17 **Q.** Okay. And Grouse River moved into that retail store in
18 July of -- in June of 2013; is that right?

19 **A.** That's correct.

20 **Q.** So you spent 10 months building out the flagship store?

21 **A.** Sounds about right.

22 **Q.** Okay. And, again, you moved into this new store before
23 Grouse River had signed a contract with NetSuite; right?

24 **A.** That is correct.

25 **Q.** And you were not using NetSuite to run Grouse River in

1 2013; right?

2 **A.** No, we were not.

3 **Q.** Okay. And, in fact, you didn't go live on NetSuite until
4 March of 2014; right?

5 **A.** That is correct.

6 **Q.** So you spent a year and a half in the new store using
7 Volusion and QuickBooks; right?

8 **A.** About that, yes.

9 **Q.** Okay. The first full year that you were in the new store,
10 which was a fiscal year, so we can't look at the results for
11 that year, you were on Volusion and QuickBooks; right?

12 **A.** We would have been on Volusion and QuickBooks all the way
13 through up until that March 24th date, correct.

14 **Q.** Right. Right. But my point is a little bit different
15 that I'm trying to make here, which is that the first full
16 year, the first full fiscal year that you were in your new
17 store -- which was fiscal year 2015; right?

18 **A.** Correct.

19 **Q.** -- you were on Volusion and QuickBooks; correct?

20 **A.** Correct.

21 **Q.** Okay. And you can see here -- and I told you I would try
22 to use fiscal years and calendar years. This is calendar year.
23 So the first full year that you were in the new store is 2014
24 in red there right there in the middle. Do you see that?

25 **A.** Are we going calendar years now?

1 **Q.** We're going calendar years now.

2 **A.** Okay. Calendar year 2014, yes.

3 **Q.** Okay. So we're all clear, the year that you were in the
4 store, the first full year, was calendar year 2014 and it was
5 also fiscal year 2015?

6 **A.** Can you repeat your question, please.

7 **Q.** Sure. The first full year that you were in the flagship
8 store using Volusion and QuickBooks was calendar year 2014 --

9 **A.** Correct.

10 **Q.** -- and you were also in the store using Volusion and
11 QuickBooks for a full year in fiscal year 2015?

12 **A.** Correct. We used that system through fiscal 2015.

13 **Q.** Okay. So let's stay with Trial Exhibit 122 in your binder
14 and let's look at the fiscal year 2014 financial statement on
15 page 5.

16 Actually, I'm going to ask you to direct your attention to
17 the column for fiscal year 2013. And, again, this is the last
18 fiscal year that you were in the small store for the entire
19 year; right?

20 **A.** That's correct.

21 **Q.** Okay. So because you moved halfway through fiscal year
22 2014, I'm going to ask you some questions about what your cost
23 structure was in the small store in your last full year in that
24 store.

25 **A.** Okay.

1 **Q.** And then we're going to skip ahead to the first full year
2 that you were in the new store so that we can compare full
3 years, and we're going to skip over the middle year because you
4 were half in one store and half in another store. Does that
5 make sense?

6 **A.** I don't necessarily agree that we were in there half the
7 year; but if you're going to skip a year, we can do that.

8 **Q.** Okay. And so we're going to look at the line -- we're
9 going to look at fiscal year 2013 in TX122, and you're going to
10 see that Grouse River's rent expense for fiscal year 2013, the
11 last full year you were in the small store, was about 76,421;
12 is that right?

13 **A.** Sorry. I'm just trying to find the line item.

14 (Witness examines document.) Yes.

15 **Q.** Okay. And then looking at Trial Exhibit 124 and turning,
16 again, to page 5, do you see that in fiscal year 2015, your
17 rent expense jumped to 270,557?

18 **A.** Yes, I do.

19 **Q.** Okay. So with the flagship retail store, Grouse River
20 more than tripled its rent expenses; correct?

21 **A.** I believe that was also due to another facility that we
22 had added in part through that year.

23 **Q.** Right. So you had more than tripled your rent expenses
24 from 2013 to -- from fiscal year 2013 to fiscal year 2015?

25 **A.** Inclusive of the retail store and our additional facility,

1 yes.

2 **Q.** And the additional facility was right there in the same
3 area as the retail store; correct?

4 **A.** In an adjacent building, yes.

5 **Q.** Okay. In fact, you quadrupled the amount of retail space
6 when you moved into the new store; correct?

7 **A.** Approximately, yes.

8 **Q.** I think the old store had approximately 3,000 square feet
9 and the new store had approximately 12,000 square feet?

10 **A.** That's right, yes.

11 **Q.** Okay. And so more retail space means you need to buy more
12 inventory to fill it; correct?

13 **A.** Correct.

14 **Q.** So looking back at Trial Exhibit 122, page 5 -- and I'm
15 happy to use the video if that would be easier -- do you see
16 that Grouse River's cost of sales was about \$2.1 million in
17 fiscal year 2013?

18 **A.** Yes, I do.

19 **Q.** Okay. And can you just explain to the jury what cost of
20 sales is?

21 **A.** Cost of sales would be the cost that we pay for the
22 product that we sell.

23 **Q.** And then comparing that to fiscal year 2015 at Trial
24 Exhibit 124, do you see that Grouse River's cost of sales was
25 about 5 million in fiscal year 2015?

1 **A.** Yes, I do.

2 **Q.** Okay. So the cost of sales in your flagship store were
3 more than double than the amount of money that you spent on
4 products in your smaller store; right?

5 **A.** Using those two figures, yes.

6 **Q.** Uh-huh. Now, in a bigger retail store also means you need
7 more employees; right?

8 **A.** That's correct.

9 **Q.** Okay. And in the smaller store -- and, again, you can
10 look at Trial Exhibit 122, page 5, or we'll put it up for
11 you -- Grouse River spent about \$666,000 on wages and benefits;
12 correct?

13 **A.** That's correct.

14 **Q.** Okay. And then in fiscal year -- actually, I'm going to
15 ask you to stay in that one and look at the fiscal year 2014.
16 And in that year where you were in both the small store and
17 then moving to the big store, Grouse River spent more than
18 \$1.4 million on wages and benefits; correct?

19 **A.** That's correct.

20 **Q.** Okay. Because you were transitioning to a larger store,
21 your employee wages were going up; correct?

22 **A.** Yes.

23 **Q.** And, then, in fact they doubled at that point; right?

24 **A.** Yes.

25 **Q.** Okay. And Grouse River had not yet signed a contract with

1 NetSuite in fiscal year 2014; right?

2 **A.** No. It was just after that.

3 **Q.** And then back at Trial Exhibit 124, page 5, after moving
4 into the flagship store, Grouse River spent over \$2 million on
5 wages and benefits; right?

6 **A.** That is correct.

7 **Q.** Okay. So we put together a slide that sort of shows us --
8 now that we've gotten all of this into the record, I just
9 wanted to make sure that we have a full picture of what we just
10 looked at.

11 Okay. And do you see that this shows the cost of sales,
12 the wages and benefits, the rent, expenses for 2013 compared to
13 2015?

14 We also put the other liabilities that we didn't go
15 through on the TXs in here, but do you see that these basically
16 represent the expenses that you had in the small store versus
17 the big store?

18 **A.** No, I don't agree with that statement.

19 **Q.** Okay. Do you disagree that the cost of sales is
20 adequately represented here?

21 **A.** Yes, it is.

22 **Q.** It is? Okay. And the wages and benefits are adequately
23 represented?

24 **A.** Yes, they are.

25 **Q.** And the rent is also represented as we just looked at?

1 **A.** As I mentioned, the rent is not just for the additional
2 store.

3 **Q.** Okay. It's for all the additional space that you leased
4 in 2012 and 2014; correct?

5 **A.** Correct.

6 **Q.** So do you disagree that your total expenses went from
7 \$3.2 million in the small store to \$8.5 million to run the
8 flagship store?

9 **A.** (Witness examines document.) I can't agree with that
10 statement. We're missing an entire year in here.

11 **Q.** I'm asking you does this adequately represent the fiscal
12 year 2013 and fiscal year 2015.

13 **A.** Not as you're representing it.

14 **Q.** Okay. Mr. Fallis, you testified that your family had only
15 put in \$500,000 before you entered into a contract with
16 NetSuite; correct?

17 **A.** Thereabouts, yes.

18 **Q.** Did you point to any document to support your statement
19 yesterday?

20 **A.** No. I did not have a document to reference at that point.

21 **Q.** And did your counsel show you any document to support that
22 statement?

23 **A.** Our financial statements would show our shareholder
24 contributions.

25 **Q.** Okay. Well, let's look at them then.

1 Let's turn to TX123, page 4.

2 In fiscal year 2014, which ends on February 28th, 2014,
3 you agree at that time you had not signed a contract with
4 NetSuite?

5 **A.** That's correct.

6 **Q.** And this statement shows that your family had loaned
7 Grouse River \$810,000; correct?

8 **A.** That's correct.

9 **Q.** And it also shows that your family had invested an
10 additional \$216,000 in Grouse River; correct?

11 **A.** That's correct.

12 **Q.** Okay. So your family had actually put more than a million
13 dollars into Grouse River by March 2014; isn't that right?

14 **A.** That's correct according to this.

15 **Q.** Right. And if you had looked at documents instead of just
16 testifying from memory, we would have had a correct number
17 yesterday; correct?

18 **A.** That is correct.

19 **Q.** Now, let's look also at the debt that you accumulated by
20 moving into the new store back on Trial Exhibit 122 at page 11.

21 **A.** (Witness examines document.)

22 **Q.** Do you see that in --

23 **MR. KIEVE:** Excuse me. What exhibit is this just for
24 my reference?

25 **MS. RAY:** Sorry. It's 122.

1 THE COURT: Page 11 of 14.

2 BY MS. RAY:

3 Q. In fiscal year 2014, calendar year 2013, Grouse River took
4 out a vehicle loan from Royal Bank of Canada in the amount of
5 \$57,000?

6 A. Yes, it did.

7 Q. And that same year Grouse River also took out a capital
8 lease loan from Royal Bank of Canada in the amount of \$744,000;
9 is that right?

10 A. That's correct.

11 Q. And that was to build out the flagship store?

12 A. In part, yes.

13 Q. Okay. And then looking at page 10 of the same exhibit,
14 Grouse River had an operating line of credit with Royal Bank of
15 Canada for a million dollars; is that right?

16 A. That's correct.

17 Q. That's like a limit on your credit card? You could spend
18 up to a million dollars; is that right?

19 A. It was a revolving credit facility, yes.

20 Q. And that year you had borrowed \$670,000 against that line
21 of credit; right?

22 A. Can you just point me to where you are on the page so I
23 can look at it?

24 Q. Sure. It's under "Bank Indebtedness." That's the
25 heading. And it's the second full paragraph.

1 **A.** (Witness examines document.) Yes, correct.

2 **Q.** Okay. And let's turn to Trial Exhibit 157 in your binder.

3 This is the agreement that reflects the operating line of
4 credit we just discussed; is that right?

5 **A.** Yes, it is.

6 **Q.** Now, after Grouse River opened that flagship retail store
7 in 2013, it never earned another profit; is that correct?

8 **A.** We turned an earnings before interest and depreciation
9 profit in 2014. We turned a profit before interest and
10 depreciation in 2014.

11 **Q.** You never made a net profit --

12 **A.** Correct.

13 **Q.** -- after you moved into the flagship retail store;
14 correct?

15 **A.** Correct.

16 **Q.** Now, after you moved into the flagship store, I think as
17 you alluded to, Grouse River also moved into new offices;
18 right?

19 **A.** Subsequent to that, yes.

20 **Q.** When you say "subsequent to that," what do you mean? You
21 mean after you moved into the flagship store, you moved into
22 new offices; right?

23 **A.** Yes.

24 **Q.** Okay. Can we look at Trial Exhibit 328?

25 **A.** (Witness examines document.)

1 **Q.** This is a lease you signed for office space in March 11th
2 of 2014; is that right?

3 **A.** For office and warehouse space, yes.

4 **Q.** Okay. And isn't it true, Mr. Fallis, that the lease that
5 you signed for the flagship store back in 2012 already included
6 office space?

7 **A.** It did include some office space, yes.

8 **Q.** But you decided to lease over 6500 square feet of
9 additional office space in March of 2014; is that right?

10 **A.** No, that is not correct.

11 **Q.** Because that's basically both office space and additional
12 warehouse space; is that right?

13 **A.** That's correct.

14 **Q.** Okay. And for the additional office and warehouse space,
15 you spent an additional \$6,000 per month; is that right?

16 **A.** That's correct, yes.

17 **Q.** So that's another \$72,000 per year rent?

18 **A.** That's correct.

19 **Q.** Okay. And you hired the same interior design firm that
20 did the retail store to design the new office space; right?

21 **A.** We did.

22 **Q.** And let's take a look at that.

23 And do you recognize these photographs as the new
24 Grouse River offices?

25 **A.** They were the additional Grouse River offices, yes.

1 **Q.** Okay. And in the photograph in the center, is that a
2 Grouse River's boardroom table?

3 **A.** That's correct.

4 **Q.** And that table is custom-made from a single slab of wood;
5 right?

6 **A.** I believe so.

7 **Q.** Okay. And it cost Grouse River about \$18,000?

8 **A.** That sounds about correct.

9 **Q.** And let's look at -- can I ask you a question? So this is
10 the new office space that you built out after moving into the
11 flagship retail store with the board table. Does Grouse River
12 have a Board of Directors?

13 **A.** No, we did not.

14 **Q.** You don't?

15 **A.** No.

16 **Q.** Now, Maciek Wronski was part of Grouse River's management
17 team; correct?

18 **A.** He was.

19 **Q.** And Ryan Wuest was also part of Grouse River's management
20 team?

21 **A.** Yes, he was.

22 **Q.** Neither Mr. Wronski nor Mr. Wuest lived in Kelowna; did
23 they?

24 **A.** That's correct.

25 **Q.** In fact, they each lived about four hours away by car;

1 correct?

2 **A.** Mr. Wuest would have been a little bit further but, yeah.

3 **Q.** Okay. So neither Mr. Wronski nor Mr. Wuest were able to
4 actually come to Grouse River's store more than about once a
5 month; isn't that right?

6 **A.** I don't know if I would agree with that.

7 **Q.** Well, didn't Mr. Wronski testify that he came to
8 Grouse River's store about once a month?

9 **A.** I recall that he might have testified to that.

10 **Q.** Okay. So they primarily worked remotely?

11 **A.** Yes, that's correct.

12 **Q.** So they didn't use this office space -- is that right? --
13 on a regular basis?

14 **A.** Define "regular basis." They would use it when they were
15 there.

16 **Q.** Five days a week.

17 **A.** No, they did not.

18 **Q.** And how much did it cost to renovate and furnish this new
19 office space?

20 **A.** We spent about \$300,000 or so on that building.

21 **Q.** Okay. You spent over \$84,000 on furniture and equipment
22 for that space?

23 **A.** That sounds about correct.

24 **Q.** Now, you testified a little bit earlier today about the
25 state of your financial performance in 2015.

THE COURT: Let's -- since that's kind of a break --

MS. RAY: Oh, sure.

THE COURT: -- and you're moving to a new topic, why
don't we just take a break right now --

MS. RAY: Sounds great.

THE COURT: -- rather than stopping in four minutes.

So we'll take a 20-minute break and hopefully that will let you guys eat your lunch. So everybody be back here in 20 minutes.

Again, the admonition remains in place. The jury is not to talk to each other about the case. Just talk to each other. Talk about other things.

See you in 20.

(Recess taken at 12:59 p.m.)

(Proceedings resumed at 1:28 p.m.)

(Proceedings were heard in the presence of the jury:)

THE COURT: Ms. Ray, you may resume your examination of Mr. Fallis.

MS. RAY: Thank you.

BY MS. RAY:

Q. Mr. Fallis, when you testified earlier with Mr. Kieve, he asked you after Go-Live, whether NetSuite resolved the problems that you claim to have had at that time, and your response was "Not all of them."

Do you recall that testimony?

1 **A.** I do.

2 **Q.** Okay. So you don't disagree with me that NetSuite, in
3 fact, did work to resolve problems after Go-Live, do you?

4 **A.** I don't disagree with that.

5 **Q.** Okay. And you don't disagree with me that NetSuite did,
6 in fact, resolve problems after Go-Live; correct?

7 **A.** I don't disagree with that.

8 **Q.** Okay. We may just disagree on the extent of the problems
9 and the extent that they were resolved; correct?

10 **A.** I think that's fair.

11 **Q.** Okay. So you also testified that in 2015 your business
12 suffered a decline. Is that correct?

13 **A.** In fiscal 2015 or calendar 2015?

14 **Q.** In calendar 2015, fiscal 2016. Thank you for the
15 clarification.

16 **A.** Yes, that's correct.

17 **Q.** Okay. And so why don't we look at that.

18 In fact, and you've told me this before, during calendar
19 year 2015, after going live on NetSuite, Grouse River
20 experienced some of its strongest sales months ever; isn't that
21 true?

22 **A.** There were some strong months in there, yes.

23 **Q.** Okay. And let's look at Trial Exhibit 141 in your binder.
24 There were some e-mails that your counsel was eager to share
25 with you, and I will now do that.

1 This is an e-mail on Monday July 13th, 2015, at least the
2 top e-mail in the chain is, between you and some of your sales
3 team; is that correct?

4 **A.** Yes, that's correct.

5 **Q.** All right. And you've seen this before; right?

6 **A.** Yes, I have.

7 **Q.** Okay. Now, by the end of June 2015, Grouse River had only
8 been using NetSuite software for about three months; correct?

9 **A.** That's correct.

10 **Q.** Okay. And in this time period in July of 2015 -- and I
11 want to focus you on the top e-mail of your chain, in
12 particular, the section "Milestones Accomplished" -- you were
13 writing to your team about some really great sales performance;
14 correct?

15 **A.** I write about the sales performance that week, yes.

16 **Q.** And you write that it has eclipsed both the number of
17 transactions and the e-commerce revenues of the same week from
18 the previous year.

19 "We beat both by about 20 percent."

20 Do you see that?

21 **A.** Yes, I do.

22 **Q.** And in July 2015, you also told your team that
23 Grouse River had achieved the highest conversion rate you'd
24 seen in the past two years outside of a major seasonal sales
25 event. Do you see that?

1 **A.** Yes, I do.

2 **Q.** Do you recall in your testimony with Mr. Kieve you said
3 that in June of 2015, the conversion rate tanked and it was ten
4 times greater on Volusion? Do you see that?

5 **A.** Yes, I did make that statement.

6 **Q.** But here you are writing, just two weeks later, that you
7 are now seeing the highest conversion rate in the past two
8 years outside of a major seasonal sales event; right?

9 **A.** That's correct.

10 **Q.** Okay. And, by the way, Mr. Fallis, you did not, in this
11 case, turn over any data from Volusion to support your
12 contention about Volusion conversion rates, did you?

13 **A.** We turned over our e-commerce conversion rates as part of
14 this legal proceeding, yes.

15 **Q.** You did not put that into evidence when you testified
16 about the Volusion conversion rates, did you?

17 **A.** We did submit our e-commerce conversion rates as part of
18 this legal action, yes.

19 **Q.** In your testimony today, did you --

20 **A.** Oh, I'm sorry.

21 **Q.** -- point to any document to support your statement about
22 what the Volusion conversion rates were?

23 **A.** No, I don't believe we did.

24 **Q.** Okay. You just relied on your memory?

25 **A.** Not on my memory. I relied on the reports that I

1 reviewed.

2 **Q.** Mr. Fallis, you did not show the jury those reports, did
3 you?

4 **A.** No, we did not.

5 **Q.** Okay. So you were relying on your memory when you were
6 describing what the conversion rates were for --

7 **A.** I see what you're saying. Yes, I did.

8 **Q.** And, again, we've seen already today that when you rely on
9 your memory instead of the documents, you can be off by about
10 \$500,000; right?

11 **MR. KIEVE:** Objection to the characterization,
12 Your Honor.

13 **THE COURT:** Overruled. Cross-examination.

14 **BY MS. RAY:**

15 **Q.** Isn't that correct?

16 **A.** Is what correct?

17 **Q.** That when you rely on your memory instead of the
18 documents, as we've already seen today, you could be off by as
19 much as \$500,000 about something; correct?

20 **A.** In that instance we referred to earlier, yes, I was.

21 **Q.** Okay. Now, staying on this document, in July of 2015, you
22 also told your team that:

23 "These results combined with a great week in both
24 retail and online sales helped push overall revenue
25 25 percent above last year."

1 Do you see that?

2 **A.** Yes, I do.

3 **Q.** So your e-commerce revenues were -- you had a great week
4 in e-commerce revenues and retail sales; correct?

5 **A.** We did.

6 **Q.** Okay. Now, you didn't tell NetSuite about these results
7 in July of 2015, did you?

8 **A.** I don't recall whether I did or didn't.

9 **Q.** Okay. And, in fact, you're aware that in July of 2015,
10 NetSuite's overall -- or Grouse River's overall sales were
11 better than they had been in July of 2014 when Grouse River was
12 using its old software system; isn't that right?

13 **A.** I believe that's right.

14 **Q.** Okay. And, in fact, you know that it's also the case that
15 Grouse River's sales were better in August and September and
16 October and November than they were in the year before when you
17 were on Volusion; isn't that correct?

18 **A.** Can you show me where that's coming from, please, so I can
19 reference it with you?

20 **Q.** Did you have a chance to review our expert's report in
21 this case?

22 **A.** I did.

23 **Q.** Okay. And you saw that he analyzed your data from
24 NetSuite that you provided in this case; correct?

25 **A.** That's correct.

1 **Q.** And you've had a chance to look at that data and determine
2 whether there are any errors in his analysis; correct?

3 **A.** That's correct.

4 **Q.** Okay. So do you agree with me that for the five months
5 after you were on NetSuite in 2015 that I just referenced, that
6 you achieved higher sales in those months than you had achieved
7 in the year prior on Volusion?

8 **A.** I'd just like to see what you're referencing so I can go
9 along with you.

10 **Q.** We will show that.

11 **A.** Okay.

12 **Q.** So you just -- you don't recall? You don't remember?
13 You're not aware?

14 **A.** I'm not certain that our sales were higher each of those
15 months, that's correct, without referencing.

16 **Q.** Don't you need to know that in order to be able to
17 prosecute this case, Mr. Fallis? Do you not know whether your
18 sales were, in fact, higher or lower in those months on
19 NetSuite software than they were on your prior software? Do
20 you know that as a CEO of the company?

21 **A.** I know that certainly we had some higher months in that
22 period, but without referencing a month-by-month document from
23 five years ago, that is hard to recall.

24 **Q.** But you just testified in this case just a few minutes ago
25 that your sales were lower because of NetSuite in 2015; right?

1 **A.** I testified that our e-commerce sales tanked in 2015, yes.

2 **Q.** Okay. So now it's just your e-commerce sales. You're
3 saying that your sales were not, in fact, lower across the
4 store?

5 **A.** Our sales were lower across the board in 2016; that's
6 correct.

7 **Q.** We'll talk about that.

8 So let me make sure I'm clear. Is it your testimony that
9 after you went live on NetSuite in 2015, that your financial
10 performance as a company did not improve?

11 **A.** That is correct.

12 **Q.** Can you turn to Trial Exhibit 124, and let's look at
13 page 5.

14 Mr. Fallis, this might be a long way from you, but I'll
15 tell you what I'm doing.

16 So Trial Exhibit 124, page 5, this is fiscal year 2015 I
17 want to direct your attention to, which is the calendar year of
18 2014.

19 For calendar year 2014, fiscal year 2015, as we've said,
20 that was your first full year in the retail store; correct?

21 **A.** Correct.

22 **Q.** And it was a year that you were using Volusion entirely;
23 correct?

24 **A.** Correct.

25 **Q.** Okay. And in that year, Grouse River sold about

1 \$7.22 million of product; correct?

2 **A.** That's correct.

3 **Q.** And in that next year after you went live on NetSuite,
4 Grouse River sold about \$6.7 million in gross sales; correct?

5 **A.** That's correct.

6 **Q.** Okay. So is that what you're referring to when you say
7 that your financial performance was affected by NetSuite? You
8 sold less in gross sales?

9 **A.** That would be a part of it, yes.

10 **Q.** Okay. And let's look at the next line on Trial
11 Exhibit 124, "Cost of Sales."

12 And you said earlier the cost of sales is what it cost you
13 to actually sell the goods. Right?

14 **A.** What it costs us to purchase the goods that we are
15 selling, yes.

16 **Q.** To purchase the goods to sell. You have to buy the goods
17 in order to sell them; right?

18 **A.** Yes, that's right.

19 **Q.** So in the year that you were on Volusion, you spent about
20 5.01 million on purchasing products that year; correct?

21 **A.** That's correct.

22 **Q.** Okay. And then the next year, when you were on NetSuite,
23 you spent 4.1; right?

24 **A.** That's correct.

25 **Q.** So you spent a million dollars less?

1 **A.** Not quite. Yes, 900,000.

2 **Q.** More or less; right?

3 **A.** (No audible response.)

4 **Q.** Okay. So what is net sales?

5 **A.** Net sales?

6 **Q.** Yeah. What's gross profit?

7 **A.** Gross profit is what's the difference between your
8 top-line sales and the cost of the goods.

9 **Q.** Okay. So your gross profit for the year that you were on
10 Volusion was 2.2; right?

11 **A.** That's correct.

12 **Q.** And your gross profit for the year that you were on
13 NetSuite was 2.57; right?

14 **A.** That's correct.

15 **Q.** Okay. So you're familiar with the term "profit margin";
16 correct?

17 **A.** Yes, I am.

18 **Q.** Okay. And the profit margin is gross profit divided by
19 sales; right?

20 **A.** Correct.

21 **Q.** That's simple math. And that tells you the profit margin,
22 how much of every dollar sold you get to keep; right?

23 **A.** That we get to put towards other expenses, correct.

24 **Q.** Sure. That you get to keep and use however you need to.

25 Maybe it's to pay a lot of other expenses. But you get to make

1 that money off of that dollar sold; correct?

2 **A.** That is correct, yes.

3 **Q.** Okay. So the year before Grouse River started using
4 NetSuite, it sold \$7.2 million in gross sales because it bought
5 \$5 million in product, and its gross profit was \$2.2 million;
6 right?

7 **A.** No, that is not correct.

8 **Q.** Can you tell me why not?

9 **A.** Yes. The cost of sales doesn't represent the product we
10 bought, but the cost of the product that we sold.

11 **Q.** Right. So once you have been able to sell the product,
12 then it's recognized that that's the cost of sales; right?

13 **A.** That's correct, yes.

14 **Q.** Okay. So you made a gross profit of 2.2?

15 **A.** Correct.

16 **Q.** Okay. And then, when you went on to our software, your
17 gross sales were lower, but you spent less money on your cost
18 of goods; correct?

19 **A.** That's correct.

20 **Q.** Okay. And your gross profit was actually higher. It was
21 \$2.5 million; correct?

22 **A.** That's correct.

23 **Q.** So your profit margin when you were on Volusion was around
24 30.6; correct?

25 **A.** In that particular year, correct.

1 **Q.** Right. And your profit margin when you were on NetSuite
2 software was about 38.4; correct?

3 **A.** In that particular year, yes.

4 **Q.** Well, that's the year that you moved to NetSuite software;
5 right? Your profit margin went up by 8 percent; correct?

6 **A.** Between those two years, yes.

7 **Q.** Yes, it did.

8 So when you point to your gross sales, you're not telling
9 the whole story, are you?

10 **A.** No. The gross sales would never be the whole story.

11 **Q.** You were more efficient in the year you moved to NetSuite
12 software than you were in the year before when you were on your
13 prior software; right?

14 **A.** No, I don't agree with that statement.

15 **Q.** Okay. You made more money on every dollar sold in the
16 year after you moved to NetSuite software than the year when
17 you were on Volusion?

18 **A.** Our gross profit is higher in that year.

19 **Q.** Because -- and that means you made more money on every
20 dollar sold; correct?

21 **A.** That is correct.

22 **Q.** Now, Grouse River buys about half of its inventory in U.S.
23 dollars; correct?

24 **A.** Yes, that would be right.

25 **Q.** But it sells that inventory in Canadian dollars; correct?

1 **A.** Yes.

2 **Q.** So if the Canadian dollar decreases in value relative to
3 the U.S. dollar, Grouse River's inventory becomes more
4 expensive for it to purchase; correct?

5 **A.** That's correct.

6 **Q.** And you sell to Canadian customers; correct?

7 **A.** We do, yes.

8 **Q.** So you're selling in Canadian dollars?

9 **A.** That's right.

10 **Q.** So you'd have to either sell that inventory at a higher
11 price or accept a lower margin; correct?

12 **A.** That's correct.

13 **Q.** And, in fact, the currency swing did hurt Grouse River in
14 calendar year 2015, the first year that you were on NetSuite;
15 correct?

16 **A.** Yes. There would be some impact there.

17 **Q.** Okay. And, in fact, let's look at TX140.

18 You wrote this e-mail to all Grouse River personnel on
19 March 1st, 2016; right?

20 **A.** Yes, I did.

21 **Q.** And that is the day after the close of fiscal year 2016,
22 calendar year 2015, your first year on NetSuite; correct?

23 **A.** That's correct.

24 **Q.** Okay. And at the end of the first paragraph, you wrote:

25 "We were also hurt by external factors such as a

1 strong unfavorable swing in the U.S. dollar through our
2 peak selling seasons -- this led to a higher cost on many
3 items and we were too slow to respond to this in our
4 pricing and marketing."

5 Do you see that?

6 **A.** I do.

7 **Q.** So if not for the currency swing that was occurring at the
8 end of 2015, Grouse River's fiscal year 2016, calendar year
9 2015, would have been even better than it was; correct?

10 **A.** Yes, that's correct.

11 **Q.** Okay. Now, let's go back to Trial Exhibit 157, please.
12 We looked at this earlier. This is the credit facility
13 agreement between Grouse River and Royal Bank of Canada; is
14 that right?

15 **A.** Yes, it is.

16 **Q.** And this agreement was signed in April of 2013; correct?

17 **A.** That's correct.

18 **Q.** And it has -- the bank put certain terms attached to this
19 agreement; correct?

20 **A.** Yes, there would be.

21 **Q.** And it required Grouse River to maintain a certain debt
22 service coverage ratio; correct?

23 **A.** That is correct.

24 **Q.** And that's a measurement of the cash available to pay debt
25 obligations; is that right?

1 **A.** Yes.

2 **Q.** Okay. And Grouse River was out of compliance with the
3 terms of this loan by the end of fiscal year 2014; correct?

4 **A.** We were out of terms with that when we signed the
5 agreement.

6 **Q.** Right. And you did not rectify that by the end of that
7 year, did you?

8 **A.** That's correct.

9 **Q.** So you continued to be out of compliance with that
10 agreement for the entire first year; right?

11 **A.** That's correct.

12 **Q.** And then you continued to be out of compliance with the
13 terms of that loan for the entire second year; correct?

14 **A.** That's correct.

15 **Q.** And then you continued to be out of compliance with the
16 terms of that loan for the entire third year; correct?

17 **A.** That's correct.

18 **Q.** Now, let's look at Trial Exhibit 158. Do you see that
19 Trial Exhibit 158 is entitled "Forbearance Agreement"?

20 **A.** I do.

21 **Q.** Are you familiar with that document?

22 **A.** I am.

23 **Q.** And it's dated February 29th, 2016; correct?

24 **A.** That's correct.

25 **Q.** And this agreement indicates that Royal Bank of Canada has

1 demanded immediate repayment of the loan; correct?

2 **A.** Yes, it does.

3 **Q.** Okay. Because at that point, as we said, Grouse River had
4 been out of compliance with the terms of that loan for almost
5 three years; correct?

6 **A.** Can you rephrase your question?

7 **Q.** Royal Bank of Canada demanded immediate repayment of the
8 loan because at this point, in February of 2016, your company
9 had been out of compliance with the terms of that loan for
10 three years; correct?

11 **A.** I have no knowledge that that was the reason for their
12 forbearance agreement.

13 **Q.** Okay. So maybe it's just a coincidence.

14 Pursuant to this agreement, your mother had to make an
15 immediate \$750,000 cash injection into Grouse River; correct?

16 **A.** Our family did that, yes.

17 **Q.** Okay. And then Grouse River had to use \$538,000 of that
18 cash to immediately repay the Capital Lease loan; correct?

19 **A.** That's correct.

20 **Q.** And then Grouse River also had to pay a 4 percent higher
21 penalty interest rate on its \$1 million line of credit;
22 correct?

23 **A.** That's correct.

24 **Q.** And do you recall where you were on that line of credit at
25 that time period?

1 **A.** We were using most of it.

2 **Q.** So you still owed the bank another million dollars?

3 **A.** That's correct.

4 **Q.** Let's talk about -- we looked earlier at a vehicle loan of
5 \$57,000 from Royal Bank of Canada in fiscal year 2014, which
6 is, again, calendar year 2013.

7 Grouse River bought a 2013 Ram truck that year for about
8 \$61,000; is that right?

9 **A.** That sounds about right.

10 **Q.** Okay. And you used that truck?

11 **A.** I did.

12 **Q.** And you testified that you bought that truck from the
13 company at some point. Correct?

14 **A.** Correct.

15 **Q.** You just don't recall what you paid Grouse River for the
16 truck?

17 **A.** The remaining balance on the loan on the truck was paid
18 off.

19 **Q.** Okay. And are you aware that Grouse River continued to
20 show that the truck was an asset in its accounting at the time
21 it terminated in July of 2017?

22 **A.** Yes, I'm aware of that.

23 **Q.** Okay. Grouse River held leadership retreats at Echo
24 Valley Ranch; right?

25 **A.** We did.

1 **Q.** And in 2013, does it sound right you spent about \$10,000
2 at that ranch?

3 **A.** That sounds about right.

4 **Q.** Okay. And in 2014, another \$11,000?

5 **A.** That sounds about right.

6 **Q.** And in June of 2015, you charged \$7,000 expense for a
7 fishing trip at a fishing lodge; is that correct?

8 **A.** I'm sorry. I didn't understand your question.

9 **Q.** Yeah. In June of 2015, did you charge the company,
10 Grouse River, for a \$7,000 fishing trip at a fishing lodge?

11 **A.** Did I personally charge the company?

12 **Q.** Did the company pay \$7,000 for a fishing trip at a fishing
13 lodge in June of 2015?

14 **A.** Yes, it did.

15 **Q.** Okay. And that was a fishing trip that you attended;
16 correct?

17 **A.** I did attend that trip.

18 **Q.** With a friend of yours and his sons?

19 **A.** Yes, with a mentor of mine.

20 **Q.** You never paid the company back for that, did you?

21 **A.** No. It was compensation for that person's participation
22 in those leadership retreats.

23 **Q.** That person was not an employee at Grouse River; correct?

24 **A.** No, he was not.

25 **Q.** I'm going to ask you to look at Trial Exhibit 201, which

1 is not in your binder. I think it's in your original binder
2 that your counsel showed you.

3 May I approach, Your Honor?

4 **THE COURT:** Yes.

5 **THE WITNESS:** Thank you.

6 **BY MS. RAY:**

7 **Q.** Do you recall testifying about this document with your
8 counsel a few moments ago?

9 **A.** Yes, I do.

10 **Q.** Okay. And so this is a document that discusses whether or
11 not NetSuite was going to be able to make it available to
12 Grouse River to use YESpay with a chip and PIN technology for
13 its point of sale, its checkout systems; correct?

14 **A.** That's the context, yes.

15 **Q.** Okay. And so you testified earlier today that you asked
16 NetSuite if you could get a second opinion -- well, let me back
17 up.

18 Can you explain to the jury what a payment processing
19 partner is?

20 **A.** To give a simple explanation, there's a connection between
21 the terminals in the store and your bank account, and there's a
22 processor that sits in between those, and you need that
23 connection in order to accept payments and get the money.

24 **Q.** Okay. And so NetSuite told you that it had a payment
25 processing partner it recommended to you called Mercury Payment

1 Systems; correct?

2 **A.** That's correct.

3 **Q.** And you testified earlier today that you wanted a second
4 opinion so that you could maybe get a better deal, maybe
5 negotiate. You wanted to have another option; correct?

6 **A.** I wanted to be able to negotiate the rates on that payment
7 processing, yes.

8 **Q.** So you asked NetSuite if they could find a second option
9 for you so that you could negotiate the deals for yourself;
10 correct?

11 **A.** NetSuite had previously discussed with us that they were
12 investigating other options, and I asked them if any were
13 available, yes.

14 **Q.** Okay. And so what you saw in this e-mail is NetSuite
15 bending over backwards to try to figure out if they could set
16 up that second payment processing system for you -- correct? --
17 so that you would have the option of negotiating between
18 Mercury and YESpay for your best deal; correct?

19 **A.** No, I don't agree with that statement.

20 **Q.** Okay. Why don't we turn to page 5 of 6. Your counsel
21 read to you some of the e-mails on this page, but not the one
22 right in the middle where Hans Sommer writes on April 21st,
23 2014, at 2:39 p.m.:

24 "YESpay in Canada? MPS is currently certified in
25 Canada with NetSuite's point of sale. Seems that should

1 be the way to go"

2 Do you see that?

3 **A.** I do.

4 **Q.** So at the time that you purchased the NetSuite
5 point-of-sale system, NetSuite was already certified with
6 Mercury Payment Systems to provide its NetSuite point-of-sale
7 functionality in Canada. You do not dispute that, do you?

8 **A.** I don't dispute that they told us that.

9 **Q.** You, in fact, went with Mercury Payment Systems for your
10 payment processing needs; correct?

11 **A.** We did.

12 **Q.** Okay. You asked NetSuite to investigate YESpay, and then
13 they went through lots of days and investigation for you to try
14 to figure out if they could add another payment processor. But
15 they had already told you they had a payment processor that was
16 certified; correct?

17 **A.** They had told us that they were already looking into other
18 options, and I asked about those options.

19 **Q.** Right. That's a different answer to my question.

20 You had already been told that they had a payment
21 processor that was certified and set up and ready to go;
22 correct?

23 **A.** That's correct.

24 **Q.** Okay. And that is who you went with for your payment
25 processing needs; correct?

1 **A.** Correct.

2 **Q.** You did not use YESpay?

3 **A.** That's correct.

4 **Q.** Okay. Let's turn to Trial Exhibit 169.

5 You looked at this with your counsel earlier as well.

6 I believe you testified this was shortly after the in-person
7 meeting with NetSuite and Grouse River in November 2013.

8 Correct?

9 **A.** Yes, that's correct.

10 **Q.** And in the e-mail, Mr. Waldron is trying to derive more
11 information and respond to some follow-up questions; correct?

12 **A.** Yes, that's correct.

13 **Q.** Okay. Let's look at page 7 of Trial Exhibit 169, and
14 specifically, I want to direct your attention to the bullet
15 point that begins "Support for serialized transactions." Do
16 you see that?

17 **A.** I do.

18 **Q.** Mr. Waldron writes:

19 "We can simply leverage NetSuite's serialized
20 inventory for everything from receipt to sale if
21 validation is required. This would mean having a NetSuite
22 back-end log-in at the gun counter."

23 Do you see that?

24 **A.** I do.

25 **Q.** So in December of 2013, four months before you signed a

1 contract, Mr. Waldron writes to you and explains to you that in
2 order to use serialized inventory, if validation is required,
3 you need to use a NetSuite back-end log-in at the gun counter;
4 correct?

5 **A.** That's what it says.

6 **Q.** Okay. And, in fact, you also had conversations about
7 NetSuite point-of-sale capability with regard to serialized
8 inventory with both Ryan Murphy and Branden Jenkins before you
9 signed the statement of work; correct?

10 **A.** I believe I did.

11 **Q.** And after you spoke to Mr. Jenkins about the NetSuite
12 point-of-sale capabilities, Mr. Jenkins wrote you an e-mail to
13 confirm that conversation, did he not?

14 **A.** I believe he did.

15 **Q.** Let's look at Trial Exhibit 356. And this is an e-mail he
16 wrote you after you had talked to him about NetSuite's
17 point-of-sale capabilities; correct?

18 **A.** Yes, it is.

19 **Q.** Now, back to the meeting in November of 2013 that you
20 attended with seven of your colleagues and with some folks from
21 NetSuite in person and by phone.

22 You recall that at that meeting there was a slide deck
23 that was presented; correct?

24 **A.** That's correct.

25 **Q.** Let's turn to Trial Exhibit 142.

1 I think I gave you the wrong exhibit number, John. No,
2 it's my fault.

3 **MR. KIEVE:** It's attached to it.

4 **MS. RAY:** But I want to look at the PowerPoint. There
5 we go. Thank you.

6 **TECH ASSISTANT:** Sorry.

7 **MS. RAY:** No worries. Sometimes technical issues just
8 happen. Right?

9 **TECH ASSISTANT:** Makes me feel much better.

10 **BY MS. RAY:**

11 **Q.** So is this a slide deck from the November 2013 meeting?

12 **A.** Yes, it is.

13 **Q.** And this very first slide says "Grouse River and NetSuite
14 Partners in the Cloud." Right?

15 **A.** That's what it says.

16 **Q.** And you understood that if you executed a contract with
17 NetSuite, you and NetSuite would be partners in the
18 implementation of the NetSuite software; right?

19 **A.** We understood that, yes.

20 **Q.** Okay. And you understood that Grouse River would have
21 significant responsibilities in order to make the NetSuite
22 implementation successful; correct?

23 **A.** Absolutely.

24 **Q.** Let's turn to page 106 of TX142. This is called "What
25 Makes a Successful Implementation?" Do you see that?

1 **A.** Just give me a moment.

2 **Q.** And this was presented to you in November of 2013; right?

3 **A.** That's correct.

4 **Q.** And do you see that the first bullet point says "Active
5 Participation from Executive Sponsors"? Correct?

6 **A.** That's correct.

7 **Q.** And that would be you? You were the executive sponsor;
8 correct?

9 **A.** I was.

10 **Q.** And did you understand in November 2013 that a successful
11 implementation would require your active participation?

12 **A.** Yes, I did.

13 **Q.** Okay. Now, Mr. Fallis, you're a hunter; correct?

14 **A.** I am.

15 **Q.** You hunt Alpine deer?

16 **A.** Yes, I do.

17 **Q.** And elk?

18 **A.** Occasionally.

19 **Q.** And bears?

20 **A.** Occasionally.

21 **Q.** And a variety of large game; right?

22 **A.** We just listed most of them, but, yes.

23 **Q.** Okay. I don't know much about it.

24 You also fish?

25 **A.** Yes.

1 **Q.** Okay. And as we saw earlier, sometimes when you're on a
2 hunting trip, you don't have e-mail access; correct?

3 **A.** That's correct.

4 **Q.** And sometimes you don't have phone access when you're on a
5 hunting trip; correct?

6 **A.** I would always have some form of communication on a
7 hunting trip.

8 **Q.** Right. Well, you had a satellite phone sometimes; right?

9 **A.** Yes.

10 **Q.** And that allowed people to leave messages for you which
11 you could check every few days; is that right?

12 **A.** Yes, every couple days.

13 **Q.** Okay. So let's look at Trial Exhibit 146. And this is an
14 e-mail chain between you and Kevin Rost, with a copy to Maciek
15 Wronski, dated July 30, 2014; correct?

16 **A.** That's correct.

17 **Q.** Now, July 2014 was a critical time for the NetSuite
18 implementation, wasn't it?

19 **A.** How so?

20 **Q.** Are you saying that July 2014 was not a critical time for
21 the NetSuite implementation?

22 **A.** I'm just not sure of your question.

23 **Q.** Well, when I asked you that exact question in your
24 deposition, you said that, yes, it was a critical time. It was
25 a time of activity in the project.

1 **A.** There was certainly activity in the project.

2 **Q.** Okay. And Mr. Rost writes in the first e-mail in this
3 chain:

4 "Attached are three scripts sent to me from
5 NetSuite."

6 Do you see that?

7 **A.** Sorry. In the first paragraph?

8 **Q.** Sorry. In the second e-mail, it looks like. Do you see
9 that?

10 **A.** At the bottom, yes, I do.

11 **Q.** Okay. Now, a script is a piece of code or other direction
12 to accomplish a certain function; correct?

13 **A.** That's correct.

14 **Q.** Okay. And it was important that scripts got finalized in
15 order to press forward with the implementation, wasn't it?

16 **A.** Yes.

17 **Q.** And in the last paragraph of your e-mail in Trial
18 Exhibit 146, you write:

19 "I am just getting on a float plane and leaving wifi,
20 so if there is something mission critical needed to move
21 anything along, please have Heather provide you with my
22 Sat phone number and there is voice mail there that will
23 be checked every couple of days."

24 Do you see that?

25 **A.** I do.

1 **Q.** So you were going on a trip?

2 **A.** Yes, I was.

3 **Q.** And you were going to be gone for a week or ten days;
4 correct?

5 **A.** That's about right.

6 **Q.** Okay. And you testified earlier that you were told before
7 you left that there was something that needed your approval;
8 correct?

9 **A.** Not my approval, but my review.

10 **Q.** Well, your review and your approval; correct?

11 **A.** It was the script for the serialized inventory, to be
12 specific.

13 **Q.** Okay. And -- but, nevertheless, you went on a ten-day
14 hunting trip; correct?

15 **A.** I did.

16 **Q.** And so let's look at Trial Exhibit 147. And this is an
17 e-mail between Kevin Rost and Cole Waldron in early
18 August 2014. And there was still a lot of work going on in
19 early August 2014; correct?

20 **A.** The implementation was ongoing, yes.

21 **Q.** And this is a subject e-mail that's referencing the change
22 order to support serialized inventory via POS; correct?

23 **A.** Yes, that's correct.

24 **Q.** And you understood that this change order needed to be
25 approved in order to move the implementation forward?

1 **A.** Yes.

2 **Q.** Okay. And Kevin replies, saying that you're away on a
3 hunting trip; is that right?

4 **A.** Yes, he does.

5 **Q.** And Mr. Rost could not make the decision on the change
6 order without you; correct?

7 **A.** Not on this one, no.

8 **Q.** You needed to be available to sign off on this change
9 order?

10 **A.** Yes. It was significant.

11 **Q.** And yet you didn't respond to this e-mail for 11 days;
12 isn't that right?

13 **A.** I don't see where I responded here, but that's possible.
14 I was away for about ten days there.

15 **Q.** Let's look at Trial Exhibit 148. And this is an e-mail
16 chain between Gary Specter and Ryan Murphy from September of
17 2014.

18 And as you know, the NetSuite implementation was ongoing
19 in September of 2014; correct?

20 **A.** Yes, it still was.

21 **Q.** And let's look at Mr. Murphy's e-mail from
22 September 11th of 2014. He writes:

23 "To add a little perspective -- Glenn has embarked on
24 yet another hunting trip. This is his fourth or fifth
25 during the implementation (and each trip lasts five days

1 or longer). Unfortunately, Kevin is not empowered at
2 Grouse River, GRO, to make any decisions without Glenn,
3 and the latest impact is that they were to have pre UAT
4 training this week. We mobilized our team, found a
5 trainer to do the work, only to have Kevin cancel last
6 minute because he can't make a decision without Glenn
7 there. So, if you can find a creative way to ask Glenn
8 how his hunting trips impact this implementation, that
9 would be great. Glenn needs to choose which is more
10 important -- hunting or getting this system live."

11 Do you see that?

12 **A.** I do see that.

13 **Q.** And in the next e-mail, Mr. Specter replies:

14 "I will send him a note."

15 Do you see that?

16 **A.** I do.

17 **Q.** So you were on notice that your hunting trips were
18 adversely affecting the NetSuite implementation, weren't you?

19 **A.** Where do you see that?

20 **Q.** Mr. Specter replies:

21 "I will send him a note."

22 **A.** He does say that.

23 **Q.** Okay. Mr. Waldron also wrote that he left you a voice
24 mail about the same issue. Are you aware of that?

25 **A.** No, I'm not.

1 **Q.** Do you recall getting a voice mail from Mr. Waldron about
2 this issue?

3 **A.** No, I do not.

4 **Q.** Well, let's look at the e-mail from David Mason-Jocksch to
5 Cole Waldron and Ryan Murphy at the bottom of page 1.

6 Mr. Mason-Jocksch writes:

7 "Where are we on signing off on these two COs?"

8 **A.** I'm sorry. I'm just trying to follow along.

9 **Q.** I might have --

10 **A.** Where are we going?

11 **Q.** I might have to move to a different exhibit. Sorry. I
12 thought it was in the same one.

13 TX500. He writes:

14 "Where are we on signing off on these two COs?"

15 "CO" is change order; correct?

16 **A.** Yes, it is.

17 **Q.** (reading)

18 "I believe, via Ryan, that Glenn is back in the
19 mountains shooting again, but I've not heard that direct
20 from Grouse River. That concerns me."

21 Do you see that?

22 **A.** Where are we looking? Sorry.

23 Oh, I'll follow here.

24 Yes, I see that.

25 **Q.** You see that?

1 And then Mr. Waldron replies and says:

2 "Yes, Glenn is hunting. I'm not sure when he is
3 back. I understand these Change Orders are urgent. I'll
4 try to call/text his cell and see if he can sign via his
5 phone. The docs are out for signature."

6 Do you see that?

7 **A.** I do.

8 **Q.** Mr. Murphy replies:

9 "I've already brought this up to Gary, but Glenn
10 going on these trips every month is having serious impact
11 to the success of this already difficult situation since
12 he's the only one who can sign."

13 Do you see that?

14 **A.** I do see that.

15 **Q.** And Mr. Waldron replies:

16 "I just left a voice mail on his cell. I agree and
17 expressed the impact this delay may have on the
18 implementation in the voice mail I left."

19 Do you see that?

20 **A.** I do see that.

21 **Q.** So does that refresh your recollection that Mr. Cole
22 Waldron called you when you were on a hunting trip in 2014 and
23 explained that your absences were having an adverse impact on
24 the implementation?

25 **A.** It doesn't say that.

1 **Q.** Do you recall getting that voice mail? Yes or no?

2 **A.** I do not recall specifically getting that voice mail, no.

3 **Q.** Let's jump to the summer of 2015. That was at the time
4 that you had gone live on NetSuite; correct?

5 **A.** Correct.

6 **Q.** And you were live on NetSuite -- sorry. And I want to ask
7 you to look at Exhibit 150. This is a printout of your Twitter
8 feed spanning some months in 2015; correct?

9 **A.** Yes, it appears to be.

10 **Q.** Let's look, for example, at your tweet from August 30th of
11 2015 on page 9 of this exhibit. It says:

12 "How much gear do three guys need to hunt off the
13 grid for ten days? Apparently this much."

14 Right?

15 **A.** That's what it says, yes.

16 **Q.** And you and I have walked through your Twitter feed
17 before; correct?

18 **A.** We have, yes.

19 **Q.** Yes, we have. And it took a little while. I'm not going
20 to do it all today. But you agree with me that the Twitter
21 feed shows that between August and November 2015, you took at
22 least five hunting trips and went on a corporate retreat;
23 correct?

24 **A.** I would need to refresh my memory by reviewing that.

25 **Q.** Okay. Well, the jury can take a look at it back in the

1 jury room.

2 You also understood, as we talked about earlier from the
3 November 2013 kickoff -- or meeting, that you had to put
4 resources in place for a successful implementation; correct?

5 **A.** That's correct.

6 **Q.** And, in fact, you had roles and responsibilities that
7 Grouse River needed to identify and fill.

8 **A.** That's correct.

9 **Q.** And one of your responsibilities as the project sponsor
10 was to provide resources needed for the successful
11 implementation.

12 **A.** Correct.

13 **Q.** You understood that to include personnel?

14 **A.** Yes.

15 **Q.** And you understood it meant that the personnel needed to
16 have the necessary skills and experience to do that work;
17 correct?

18 **A.** Certainly.

19 **Q.** And, again, this was a shared project?

20 **A.** Yes.

21 **Q.** Now, you did not have a defined information technology
22 team when you signed the contract with NetSuite in March of
23 2014; correct?

24 **A.** That's correct.

25 **Q.** And you did not have a systems administrator when you

1 signed the contract with NetSuite in March of 2014; correct?

2 **A.** That's correct.

3 **Q.** And you agree that the system administrator is an
4 important role when you're doing a software implementation like
5 the one that Grouse River did with NetSuite?

6 **A.** We needed an administrator, yes.

7 **Q.** Now, your eventual systems administrator, Kevin Rost, was
8 not involved in the selection of NetSuite, was he?

9 **A.** No, he was not.

10 **Q.** And, in fact, he did not have previous experience with
11 NetSuite, did he?

12 **A.** No, he did not.

13 **Q.** And he was also new to your company; so he did not have
14 extensive familiarity with Grouse River's business, did he?

15 **A.** That's correct.

16 **Q.** You also did not have an e-commerce manager when you
17 signed the contract with NetSuite in March 2014; correct?

18 **A.** That's correct.

19 **Q.** And you had still not hired an e-commerce manager by May
20 of 2014; correct?

21 **A.** That's correct.

22 **Q.** Troy Hill and Kristen Harder were the Grouse River
23 employees working on e-commerce as of May 2014; correct?

24 **A.** Two of them, yes.

25 **Q.** Well, we'll hear from both of them later.

1 Did you have a conversation with Ryan Murphy of NetSuite
2 about Grouse River staffing during the summer of 2014?

3 **A.** I don't recall specifically.

4 **Q.** It's possible?

5 **A.** Certainly.

6 **Q.** Can you look quickly at Trial Exhibit 151.

7 Do you recognize this document?

8 **A.** Yes, I do.

9 **Q.** This is a list of terminated and departing Grouse River
10 employees; correct?

11 **A.** Yes, it is.

12 **Q.** And that's your handwriting on the document; correct?

13 **A.** Yes, it is.

14 **Q.** Now, it was Grouse River's responsibility to migrate its
15 data into NetSuite; right?

16 **A.** Yes.

17 **Q.** You took on that responsibility in the contracts; correct?

18 **A.** Yes, we did.

19 **Q.** Let's look at Trial Exhibit 7, the business requirements
20 contract that you signed at page 97. And at the top of the
21 page, under "Data Configuration," it says:

22 "The configuration of data plays an important role in
23 the overall configuration of the NetSuite application."

24 Do you see that?

25 **A.** I do, yes.

1 **Q.** And then below the first bullet point on this page says:
2 "Responsibility for data migration rests solely on
3 Grouse River Outfitters."
4 Do you see that?

5 **A.** I do.

6 **Q.** And the chart below lists five data components; correct?

7 **A.** That's correct.

8 **Q.** And each of them -- chart of accounts, employees,
9 customers, vendors, and items -- lists responsibility with you,
10 the customer?

11 **A.** That's correct.

12 **Q.** One piece of data that had to be migrated was
13 Grouse River's accounting data; correct?

14 **A.** Correct.

15 **Q.** And a woman named Stacie Coyle was in charge of accounting
16 and finance at Grouse River in 2014; correct?

17 **A.** That's correct.

18 **Q.** And she took the lead on accounting for the NetSuite
19 implementation; correct?

20 **A.** That's correct.

21 **Q.** But Ms. Coyle left Grouse River in early March of 2015
22 just before Go-Live, didn't she?

23 **A.** She did.

24 **Q.** And Ms. Coyle failed to finish validating the account
25 setup and other information before she left; correct?

1 **A.** She had a terminal brain tumor. I don't know that she had
2 a choice.

3 **Q.** I understand. I'm just asking, was the validation
4 completed before Go-Live?

5 **A.** No, it was not.

6 **Q.** Grouse River did not hire a replacement for Ms. Coyle
7 before she left; correct?

8 **A.** That's correct.

9 **Q.** Let's look at Trial Exhibit 156. This is an e-mail chain
10 between you and Tyler Neels in May of 2017; correct?

11 **A.** That's correct.

12 **Q.** And Tyler Neels worked for Grouse River's accountant,
13 Grant Thornton?

14 **A.** Yes, he did.

15 **Q.** So in May of 2016, this e-mail shows you reaching out to
16 Grant Thornton to ask for help in validating and reconciling
17 numerous outstanding items; correct?

18 **A.** That's correct.

19 **Q.** This was more than a year after Grouse River went live on
20 NetSuite; right?

21 **A.** Yes, it is.

22 **Q.** And Mr. Neels writes back to you and talks about setting
23 up a time to talk. And he says:

24 "In advance, I have attached the previous proposal
25 that Nihad had drafted last year that may still be of

1 interest."

2 Do you see that?

3 **A.** That's correct.

4 **Q.** And the attached presentation is dated March of 2015;
5 correct?

6 **A.** Do we have it for reference?

7 **Q.** We will shortly.

8 **A.** Yes, it is.

9 **Q.** March 2015 was the month you went live on Grouse River --
10 on NetSuite software; correct?

11 **A.** That's correct.

12 **Q.** Let's turn to page 5 of 14. So do you recall that in
13 March of 2015, you reached out to Grant Thornton and asked for
14 help validating the accounting data as you transferred into the
15 NetSuite system?

16 **A.** We considered their assistance, yes.

17 **Q.** And they provided a presentation to you and they said, "We
18 can do that. We can help you migrate your accounting data from
19 your old systems into NetSuite." Correct?

20 **A.** That's not the entirety of what we were looking for here,
21 no.

22 **Q.** It's a component of what they were offering you; correct?

23 **A.** They validated the integrity, yes, not the actual
24 migration.

25 **Q.** Well, they were offering you here that they would optimize

1 NetSuite design functionality to better suit Grouse River's
2 business objectives. They're offering that they would address
3 knowledge transfer requirements; they would address process
4 improvement opportunities.

5 **A.** That's correct.

6 **Q.** You're aware that the person who wrote this presentation
7 had extensive experience migrating companies' data, accounting
8 data, into NetSuite; correct?

9 **A.** That's what was represented, yes.

10 **Q.** Right. You did not hire these folks to help you move your
11 data after Stacie Coyle had to leave your company, did you?

12 **A.** Not at that point, no.

13 **Q.** In fact, you waited and you had to do it a year later
14 because of the problems that were created by not doing it
15 properly the first time; correct?

16 **A.** I don't agree with that, no.

17 **Q.** And Grouse River also did not do a full inventory count
18 before Go-Live, did it?

19 **A.** No, we did not.

20 **Q.** Let's look at Trial Exhibit 116. This is an e-mail chain
21 from January 2016 between you and Maciek Wronski; correct?

22 **A.** That's correct.

23 **Q.** And Mr. Wronski was in charge of your purchasing; is that
24 right?

25 **A.** Yes, he was.

1 **Q.** And let's look at Mr. Wronski's January 14th, 2016,
2 message to you at the top of page 3. On the first line, he
3 says:

4 "We have identified how critical it is for us to
5 complete a full inventory count so an accurate baseline
6 could [be] established since before NetSuite went live and
7 still have not executed on this critical task."

8 Do you see that?

9 **A.** I do.

10 **Q.** Okay. So the head of your purchasing is saying: We
11 should have done an inventory count before we went live on
12 NetSuite, and the failure to do so is still having impacts on
13 us today. Correct?

14 **A.** That's correct.

15 **Q.** Okay. And earlier, when you testified with your counsel,
16 when he asked you to identify what was causing your cash flow
17 issues, you said inventory visibility was causing your cash
18 flow issues; is that correct?

19 **A.** That's correct.

20 **Q.** You also engaged -- talk a little bit about your
21 e-commerce performance. You engaged an individual named Chris
22 Szczechko to come in and evaluate Grouse River's e-commerce
23 operations after Grouse River had gone live on NetSuite; right?

24 **A.** That's correct.

25 **Q.** And that was in the summer of 2015; correct?

1 **A.** That's right.

2 **Q.** And Grouse River asked Mr. Szczepko to make a report;
3 correct?

4 **A.** Yes, we did.

5 **Q.** And he did that. He made a report.

6 Let's turn to Trial Exhibit 152 in your binder. Do you
7 see the e-mail, to which this presentation I will show you is
8 attached, is from Vince Kuipers to Kevin Rost and Chris
9 Szczepko? Do you see that?

10 **A.** Yes, I do.

11 **Q.** Okay. And he writes:

12 "Hi, Chris and Kevin. Kevin will be at the NetSuite
13 Advisory Board next week rubbing shoulders with industry
14 professionals."

15 Do you see that?

16 **A.** Yes, I do.

17 **Q.** You sent Kevin Rost to the NetSuite customer advisory
18 board in 2015?

19 **A.** I did.

20 **Q.** And then he writes:

21 "He will have the opportunity to establish
22 relationships with solution providers in the industry."

23 Do you see that?

24 **A.** Yes, I do.

25 **Q.** And you also participated in the customer advisory board

1 with NetSuite, did you not?

2 **A.** Prior to this, yes.

3 **Q.** Now, let's turn to the report that Mr. Waldron prepared.

4 This is the PowerPoint presentation that he prepared.

5 It's dated August of 2015. Do you see that?

6 **A.** Yes, I do.

7 **Q.** And then let's turn to page 15 of this presentation. He
8 writes:

9 "Product information is limited and poorly
10 presented."

11 Do you see that?

12 **A.** Yes, I do.

13 **Q.** And he's referring to your e-commerce website; correct?

14 **A.** Yes, he is.

15 **Q.** Now, NetSuite was not responsible for inputting product
16 information on the Grouse River website; correct?

17 **A.** No, they were not.

18 **Q.** On page 21 of Trial Exhibit 152, Mr. Szczepko writes under
19 "Observations":

20 "E-commerce is not a subset of retail or marketing --
21 don't assume the skills are transferable, and don't assume
22 the requirements are the same."

23 Did you have an understanding that he was explaining to
24 you that you needed to hire people with e-commerce expertise
25 because it's not a transferable skill?

1 **A.** I can't recall my understanding at the time of that
2 statement, no.

3 **Q.** And the next bullet point says:

4 "A two-person department delivering growth?"

5 Do you see that?

6 **A.** I do.

7 **Q.** Are you aware or do you recall that at that time, Kristen
8 Harder and Troy Hill were the only members of your e-commerce
9 department?

10 **A.** That's correct.

11 **Q.** And the next point says:

12 "Default blame on NetSuite -- Problems are left
13 unsolved because of the assumption that it is a platform
14 issue. Too often we're dealing with human error."

15 Do you see that?

16 **A.** I do.

17 **Q.** The report doesn't say NetSuite is causing Grouse River's
18 e-commerce issues, does it?

19 **A.** No, I don't believe it does.

20 **Q.** It says Grouse River is putting too much blame on
21 NetSuite, doesn't it?

22 **A.** It says:

23 "Default blame on NetSuite."

24 **Q.** Grouse River didn't bring Mr. Szczepko to trial; correct?

25 **A.** That's correct.

1 **Q.** Let's look at page 25 of Exhibit 152. It says "E-Commerce
2 Overview." Do you see that?

3 **A.** I do.

4 **Q.** And it's quite long. We don't have time to read it all,
5 but the jury can review it in the jury room.

6 Let's look at page 26 under "Site Speed." It says:

7 "Current page load times for Grouse River are well
8 below acceptable levels. Recent tests have reported up to
9 8.5 seconds The primary cause of this issue
10 appears to be image handling."

11 Do you see that?

12 **A.** I do.

13 **Q.** And Grouse River was responsible for compression of images
14 on its website; correct?

15 **A.** That's correct.

16 **Q.** Because Grouse River was responsible for the content of
17 its website; correct?

18 **A.** That's correct.

19 **Q.** And let's go to the next page, 27. At the top, it says:

20 "The recommended course of action is twofold."

21 And the first recommendation is:

22 "Internal focus needs to be placed on image
23 compression."

24 Do you see that?

25 **A.** I do.

1 **Q.** And the last sentence in the document says:

2 "For example, only Kristen seems to know how to
3 upload content in NetSuite, and based on what I've seen,
4 she's not entirely clear on how some of it works."

5 Do you see that?

6 **A.** Sorry. Where are we?

7 **Q.** I'm sorry. It's on a different page. We can skip.

8 Right below -- on page 30, there's a heading called
9 "E-Commerce Team"; correct?

10 **A.** Yes.

11 **Q.** And there's a list underneath that of roles for an
12 e-commerce department; correct?

13 **A.** Yes.

14 **Q.** And Mr. Szczechko recommended to Grouse River that you fill
15 those roles; correct?

16 **A.** He -- that was his recommendation, yes.

17 **Q.** You, in fact, did not fill those roles; isn't that right?

18 **A.** That is incorrect.

19 **Q.** Which roles did you fill?

20 **A.** The database administrator role was also part of Kristen
21 Harder's role. We hired a graphic designer in addition to the
22 one we already had, and we appointed a product merchandiser.
23 We also assigned somebody to the content coordinator/social
24 media.

25 **Q.** You didn't hire a developer?

1 **A.** No, we did not.

2 **Q.** You didn't hire someone to coordinate your social media?

3 **A.** Yes, I said that we did.

4 **Q.** Sorry. I didn't hear that.

5 And then the next page, an SEM specialist.

6 **A.** No, we did not.

7 **Q.** Now, you previously sold software for six years; correct?

8 **A.** Yes, that's correct.

9 **Q.** And you sold both the software and also the implementation
10 services; correct?

11 **A.** That's correct.

12 **Q.** And you sold software and implementation services worth
13 hundreds of thousands of dollars; correct?

14 **A.** That's correct.

15 **Q.** So you sold large, complex packages to customers?

16 **A.** Yes.

17 **Q.** So you understand what an implementation is; correct?

18 **A.** I do.

19 **Q.** Let's turn to Trial Exhibit 2, the subscription services
20 agreement between Grouse River and NetSuite.

21 You signed this document on behalf of Grouse River;
22 correct?

23 **A.** I did.

24 **Q.** And you read it before you signed it?

25 **A.** Yes.

1 **Q.** And you understood it before you signed it?

2 **A.** Yes.

3 **Q.** And you acknowledged, when you signed it, that you read
4 and understood it; correct?

5 **A.** That's correct.

6 **Q.** You had the opportunity to confer with legal counsel
7 before signing this document; correct?

8 **A.** I did.

9 **Q.** And you, in fact, discussed this contract with your lawyer
10 before you signed it; correct?

11 **A.** Yes, I did.

12 **Q.** And you chose to have a lawyer review this contract before
13 signing it because this was an important project for
14 Grouse River; right?

15 **A.** That's correct.

16 **Q.** That wasn't your normal practice; right?

17 **A.** No, not for everything, no.

18 **Q.** There was a lot of intricacies in getting the project to
19 the point of signing a contract; right?

20 **A.** It was an involved process, yes.

21 **Q.** There was a fairly extensive set of language in the
22 contracts; right?

23 **A.** That is correct.

24 **Q.** Let's look at Section 13 of this contract on page 9.

25 You understood this provision when you signed this

1 agreement; correct?

2 **A.** I had read this provision when I signed the agreement,
3 yes.

4 **Q.** And you understood it when you signed the agreement?

5 **A.** I understood the contract when I signed it, yes.

6 **Q.** And it states:

7 "This agreement, including all exhibits and/or
8 estimate order forms, shall constitute the entire
9 understanding between customer and NetSuite and is
10 intended to be the final and entire expression of their
11 agreement."

12 Right?

13 **A.** That's what it says, yes.

14 **Q.** And it says:

15 "The parties expressly disclaim any reliance on any
16 and all prior discussions, e-mails, RFPs, and/or
17 agreements between the parties."

18 Correct?

19 **A.** That's correct.

20 **Q.** There are no other verbal agreements, representations,
21 warranties, undertakings, or other agreements between the
22 parties; correct?

23 **A.** That's what it says, yes.

24 **Q.** Did anyone ever tell you this provision doesn't apply to
25 Grouse River?

1 **A.** No, nobody ever told me that.

2 **Q.** Let's look at the statement of work, Trial Exhibit 3. You
3 read this document before signing it, of course?

4 **A.** Yes, I did.

5 **Q.** In fact, you negotiated this document extensively;
6 correct?

7 **A.** We did extensive back-and-forth on this document, yes.

8 **Q.** And you understood this document before you signed it;
9 correct?

10 **A.** Are we talking about the same one? I think I just
11 answered that, yes.

12 **Q.** I might have asked you that already.

13 Let's turn to page 32 of Trial Exhibit 3. Again, this
14 document reads:

15 "Statement of work, including the exhibits and the PS
16 terms, shall constitute the entire understanding between
17 the customer and NetSuite and is intended as the final
18 expression of the parties' agreement regarding the
19 professional services to be provided by NetSuite."

20 Right?

21 **A.** That's correct.

22 **Q.** So this is talking about the implementation of the project
23 and what services NetSuite is going to provide?

24 **A.** Correct.

25 **Q.** And this is saying: Everything we agree to is in this

1 document; correct?

2 **A.** That's what it says, yes.

3 **Q.** You had a chance to review this with your counsel;
4 correct?

5 **A.** I don't recall that our counsel reviewed this particular
6 document.

7 **Q.** You had the opportunity to do that; correct?

8 **A.** Yes, we had the opportunity.

9 **Q.** And you extensively negotiated this contract; correct?

10 **A.** Yes, we did.

11 **Q.** And you did that after nine of the ten representations
12 that you were alleging in this case are fraud; correct?

13 **A.** Yes.

14 **Q.** You agree with me that you, as a businessperson, want your
15 contracts to accurately reflect the parties' agreements;
16 correct?

17 **A.** Yes.

18 **Q.** Let's turn to Trial Exhibit 4. Do you recognize this as
19 the estimate?

20 **A.** Yes.

21 **Q.** For the software and services that Grouse River was
22 buying; right?

23 **A.** That's correct.

24 **Q.** And you signed this estimate?

25 **A.** Yes, I did.

1 **Q.** And you read it before you signed it?

2 **A.** Yes, I did.

3 **Q.** And you understood it before you signed it?

4 **A.** Yes, I thought so.

5 **Q.** Let's take a look at page 3 of Trial Exhibit 4. Do you
6 see the first number on this page is a subtotal of 405,900?

7 **A.** Yes.

8 **Q.** And then a discount of 361,251?

9 **A.** That's correct.

10 **Q.** That's almost a 90 percent discount; right?

11 **A.** That's about right.

12 **Q.** Now, NetSuite had disclosed to you that it was interested
13 in obtaining more of the Canadian retail market; correct?

14 **A.** That's correct.

15 **Q.** In fact, you wrote to Mr. Waldron, after the contracts
16 were signed, that you were going to help him, quote, sell like
17 a madman; right?

18 **A.** I thought that we could use the account, once it was
19 successfully up and running, and my software experience to help
20 NetSuite promote their product if they wanted to, sure.

21 **Q.** And NetSuite thought that too; right?

22 **A.** I believe so.

23 **Q.** Let's turn to Trial Exhibit 7, the business requirements
24 document signed by Grouse River and NetSuite.

25 And you reviewed this document before you signed it?

1 **A.** Yes.

2 **Q.** And you had the opportunity to request changes be made to
3 this document; correct?

4 **A.** Yes, I did.

5 **Q.** In fact, there was an extensive, months' long dialogue
6 between Grouse River and NetSuite leading up to the signing of
7 this contract; correct?

8 **A.** That's correct.

9 **Q.** Let's look at Section 18 of this contract on page 108.
10 This says:

11 "NetSuite Professional Services and Grouse River
12 Outfitters are in agreement that the requirements document
13 above are accurate and representative of the customer's
14 business needs. This document will act as the basis for
15 all subsequent implementation activities."

16 Do you see that?

17 **A.** Yes, I do.

18 **Q.** You reviewed that?

19 **A.** Yes, I did.

20 **Q.** You signed this document?

21 **A.** I did.

22 **Q.** And when you signed this document, it was your
23 understanding that it accurately reflected Grouse River's
24 business needs; correct?

25 **A.** That is correct.

1 **Q.** And you understood that what was in this document was
2 going to serve as the basis for work going forward; correct?

3 **A.** That's correct.

4 **Q.** And this is over 100 pages long; correct?

5 **A.** That's correct.

6 **Q.** And, again, it was the product of extensive effort over
7 many months by both Grouse River and NetSuite; correct?

8 **A.** That's correct.

9 **Q.** And you testified the idea -- that you understood the idea
10 behind creating this business requirements document was to
11 ensure that everybody was on the same page about what was going
12 to be done moving forward; correct?

13 **A.** That we had an understanding about what we were
14 implementing, yes.

15 **Q.** And you're not bringing a claim for breach of these
16 agreements that we just reviewed; correct?

17 **A.** That's correct.

18 **Q.** You're not bringing a claim that NetSuite breached its
19 subscription services agreement; correct?

20 **A.** That's correct.

21 **Q.** You're not bringing a claim that NetSuite breached the
22 statement of work; correct?

23 **A.** That's correct.

24 **Q.** And you're not bringing a claim that NetSuite breached the
25 business requirements document; correct?

1 **A.** That's correct.

2 **Q.** Now, Troy Hill was Grouse River's e-commerce and technical
3 manager in 2015; correct?

4 **A.** Correct.

5 **Q.** And he attended the meeting between NetSuite and
6 Grouse River in late November of 2013; correct?

7 **A.** Yes, he did.

8 **Q.** Along with you and six other Grouse River employees;
9 right?

10 **A.** That's correct.

11 **Q.** And it's your position that NetSuite made false statements
12 to Grouse River at that meeting; correct?

13 **A.** Yes, it is.

14 **Q.** Now, Mr. Hill also received a copy of the presentation
15 from the November 2013 meeting; correct?

16 **A.** Yes, he would have.

17 **Q.** And it's your position that NetSuite made false statements
18 to Grouse River in that presentation; correct?

19 **A.** That is correct.

20 **Q.** Now, Mr. Hill also attended a January 6, 2014, meeting
21 with NetSuite; correct?

22 **A.** Yes, I believe he did.

23 **Q.** And it's your position that NetSuite made false
24 representations to Grouse River at that January 6, 2014,
25 meeting; correct?

1 **A.** Correct.

2 **Q.** And Grouse River employees, besides you and Mr. Hill,
3 attended meetings with NetSuite at which you now claim false
4 statements were made; correct?

5 **A.** Correct.

6 **Q.** Stacie Coyle attended the November 2013 meeting; right?

7 **A.** That's correct.

8 **Q.** So did Maciek Wronski?

9 **A.** Yes, he did.

10 **Q.** And Vince Kuipers?

11 **A.** Yes.

12 **Q.** And Amber Coyle?

13 **A.** Yes.

14 **Q.** And Leslie Ballan?

15 **A.** Yes.

16 **Q.** And Eddie Drgano?

17 **A.** Yes.

18 **Q.** But none of them are going to appear in court this week;
19 correct?

20 **A.** That's correct.

21 **Q.** You stated yesterday that Grouse River couldn't afford to
22 bring any other witness to trial, didn't you?

23 **A.** I did.

24 **Q.** Do you recall yesterday there were two people sitting at
25 counsel table that Mr. Susman did not introduce to the jury?

1 **A.** Yes.

2 **Q.** Who were they?

3 **A.** They were Tara Trask and David Barnard.

4 **Q.** And why were they here?

5 **A.** To help with our jury selection process.

6 **Q.** Are they consultants, jury consultants?

7 **A.** That's correct.

8 **Q.** So you paid the jury consultants to come here to trial to
9 help you select a jury; correct?

10 **A.** No, I did not.

11 **Q.** Who paid for the jury consultants, Mr. Fallis?

12 **A.** I honestly don't know who's paying for the jury
13 consultants.

14 **Q.** Who's paying for this litigation, Mr. Fallis?

15 **A.** We've paid for part of it. We have a litigation funder
16 paying for part of it.

17 **Q.** Are you telling me that the litigation funder, who is
18 betting on this litigation, could not pay to bring any of your
19 employees here to testify on behalf of your claims?

20 **A.** That's what I'm telling you, yes.

21 **Q.** You showed the jury a video today that you created in
22 July -- in August of 2017; correct?

23 **A.** That's correct.

24 **Q.** You weren't in business in August of 2017; correct?

25 **A.** We had just closed down two weeks prior.

Q. Grouse River was out of business in August 2017 when you made that video?

A. We had closed our operations, yes.

Q. So you'd laid off your employees by then?

A. That's correct.

Q. You no longer had an e-commerce department, whatever it was; correct?

A. That's correct.

Q. And you had already been in this litigation for over a year at the point that you made that video; correct?

A. That's correct.

MS. RAY: I have no further questions, Your Honor.

THE COURT: All right. Redirect? You've got 25 minutes.

MR. KIEVE: May I ask for a five-minute break?

THE COURT: Sure. We'll take just a seven -- five-minute stretch, seventh-inning stretch. That's fine. Five minutes.

If anybody wants to get up and run to the bathroom, that's fine. If you want to stand up and stretch, you're welcome to do that. I'm not leaving the courtroom, but you're welcome to.

(Recess taken at 2:38 p.m.)

(Proceedings resumed at 2:45 p.m.)

THE COURT: We'll go on the record.

MR. KIEVE: Since they put up their slides, can I ask

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1 that their tech person put them up when I ask to put them up on
2 cross?

3 **MS. RAY:** That would be fine.

4 **THE COURT:** Good. Thank you for doing that.

5 **MS. RAY:** John, would you put up the slides when they
6 ask?

7 **THE COURT:** It'll be your exhibits.

8 **MS. RAY:** It'll be our stuff.

9 **TECH ASSISTANT:** Sure.

10 **THE COURT:** Thank you for doing that.

11 **REDIRECT EXAMINATION**

12 **BY MR. KIEVE:**

13 **Q.** Ms. Ray showed you a chart with the years 2013 and 2015.
14 I believe it was a demonstrative.

15 **MS. RAY:** Oh, you don't want the evidence; you want
16 our demonstratives?

17 **MR. KIEVE:** No. You had --

18 **THE COURT:** There's a poster board right there. Is
19 that what you're looking for?

20 **MR. KIEVE:** No, no. It was a vertical.

21 **MS. XI:** Those things that -- the 3.5 expenses?

22 **MR. KIEVE:** One of the first ones you put up.

23 **TECH ASSISTANT:** That one?

24 **MR. KIEVE:** That was the one.

25 \\\

1 **BY MR. KIEVE:**

2 **Q.** And Ms. Ray asked you, did that accurately reflect the
3 period. And you said "no."

4 **A.** Correct.

5 **Q.** Would you tell the jury why it does not accurately reflect
6 the period?

7 **A.** There is almost an entire year in that new store that is
8 not reflected in that data. It was run at about a \$6 million
9 revenue stream with profitable operations and a small net loss
10 based on amortization.

11 **Q.** Okay. Ms. Ray also asked you to take a look at TX141, a
12 set of milestones. Now, that was the document that I was going
13 to show you, and then she showed you, and now I get to talk
14 about it.

15 **A.** Yes.

16 **Q.** Okay. This reflects milestones accomplished.

17 **A.** Correct.

18 **Q.** What efforts -- this is now July 13, 2015. You went live
19 with NetSuite in March of 2015. There was an intervening
20 period of time. You testified to the jury about the impact
21 that it had on you, the NetSuite system. What efforts did it
22 take to achieve these milestones?

23 **A.** We had to completely redirect our traditional marketing
24 efforts towards e-mail campaigns that would allow us to send
25 e-mails to customers, direct them specifically to a product on

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1 the website through a direct link click-through through the
2 e-mail so that they didn't encounter the navigation or search
3 issues on the website and could proceed with attempting to
4 purchase a product.

5 It was detrimental to our margins, as we saw in Ms. Ray's
6 chart, and impacted our business in a non-sustainable manner.
7 We couldn't keep that up forever.

8 **Q.** Okay. We went over that chart that she prepared with
9 profit margins and gross profits.

10 Did profit margins have any relationship to the impact of
11 the NetSuite system? These are above-the-line items; correct?
12 Cost of goods and sales. Those are profit margins at the top
13 of the line. Am I correct?

14 **A.** That's correct.

15 **Q.** Do they reflect any of the impacts of the NetSuite
16 problem?

17 **A.** There's nothing in our cost of goods directly that gets
18 impacted by our software provider.

19 **Q.** Let's take a look at Exhibit Number 140, benefits changes.
20 Why did you change your benefits?

21 **A.** We were in a cash flow crunch a year after going live on
22 this system, and we decided to look at areas that we could
23 conserve.

24 We'd consistently offered an increasing level of benefits
25 to our employees through the entire growth of our organization.

1 And at this point, it was no longer sustainable. We viewed it
2 as a cost-cutting measure.

3 **Q.** Okay. Is NetSuite implicit in this document?

4 **MS. RAY:** Objection, Your Honor.

5 **THE COURT:** Overruled. It's redirect. Fairly in the
6 scope of cross-examination.

7 **MS. RAY:** I'm sorry. I'm objecting to foundation.

8 **THE COURT:** Okay. Well, so, all right. So you're
9 objecting to foundation.

10 **MR. KIEVE:** I'll reframe it.

11 **THE COURT:** Why don't you -- all right. So I'll
12 sustain the objection as to foundation. Just reframe it. And
13 just ground it in facts, and you'll be fine.

14 Do you have a basis as a matter of fact for commenting on
15 these things? Yes. What is that basis?

16 **BY MR. KIEVE:**

17 **Q.** Yes. Do you have a basis for believing that NetSuite's
18 conduct had an impact on these results?

19 **A.** I do have a belief that a year after being live on this
20 system, it impacted our business to such a degree that we were
21 in a position we needed to take this kind of action, yes.

22 **Q.** Thank you.

23 Could we see TX157.

24 This is the Royal Bank of Canada credit facilities
25 agreement?

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1 **A.** That's correct.

2 **Q.** How did you get this credit facilities agreement?

3 **A.** We provided them with a copy of our updated business plan
4 as of that time. We showed them the historical performance of
5 our business, and we agreed to back it with our own finances.

6 **Q.** There was some discussion of your being out of compliance.

7 Did the Royal Bank of Canada continue to loan you money while
8 you were out of compliance?

9 **A.** They did.

10 **Q.** Why?

11 **A.** They saw --

12 **MS. RAY:** Objection, Your Honor.

13 **THE COURT:** Objection as to foundation?

14 **MS. RAY:** Why did the Royal Bank of Canada loan them
15 money? Yes, the objection is to foundation.

16 **THE COURT:** Okay.

17 **MS. RAY:** And --

18 **THE COURT:** Do you know why? How?

19 I mean, I don't know. He may or may not know the answer.
20 But you've got to ask the questions to lay foundation.

21 Objection sustained.

22 **BY MR. KIEVE:**

23 **Q.** Do you know why the Royal Bank of Canada continued to lend
24 you money?

25 **A.** I know the Royal Bank of Canada does not lend money unless

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1 there is a viable business there. They commented that to me
2 personally as part of the reason the forbearance agreement took
3 place. I had that conversation with somebody there.

4 **MS. RAY:** Objection, Your Honor.

5 **THE WITNESS:** Exactly this matter.

6 I'm answering the question.

7 **THE COURT:** So objection as to hearsay?

8 **MS. RAY:** Hearsay.

9 **THE COURT:** The hearsay objection is sustained.

10 **MR. KIEVE:** Not offered for the truth.

11 **THE COURT:** Okay. Well, so --

12 **MS. RAY:** It is.

13 **THE COURT:** Well, it is offered for the truth. How is
14 it not offered for the truth? So --

15 **MR. KIEVE:** Never mind.

16 **THE COURT:** Again, the objection to foundation is
17 sustained.

18 You might be able to lay the foundation. Say: What did
19 you do? And what happened after? Inferences can be drawn from
20 facts.

21 **MR. KIEVE:** I've got it.

22 **BY MR. KIEVE:**

23 **Q.** When did the Royal Bank of Canada stop lending you money?

24 **A.** In 2016, when they put forth the forbearance agreement.

25 **Q.** And what was the cause of the forbearance agreement?

1 MS. RAY: Objection, Your Honor.

2 BY MR. KIEVE:

3 Q. What did you do to get the forbearance agreement?

4 THE COURT: Just talk about what you did and not what
5 anyone told you. Just talk about what you did.

6 MR. KIEVE: Gotcha.

7 THE COURT: Things you did.

8 THE WITNESS: Sure. The Royal Bank of Canada called
9 me and let me know they'd be sending it.

10 BY MR. KIEVE:

11 Q. Okay. I won't get into the truck.

12 You went on leadership retreats, fishing trips. Why did
13 you do this?

14 A. We'd consistently done this since the very first year we
15 were in business. Every fall, I would take senior people from
16 across our company away for a weekend or a few days. We would
17 discuss business planning, ideas, concepts, and the growth of
18 the business. It was part of our rhythm, if you will.

19 Q. Why didn't you stop doing this during the implementation?

20 A. If anything, it became more critical than ever. We had
21 all sorts of additional things to discuss about the forward
22 progress of the business, both through the implementation and
23 what we expected to do beyond it.

24 Q. And what about your hunting trips?

25 A. Again, those had been consistent ever since the start of

1 the business. If anything, they slowed down during that
2 period.

3 **Q.** Could we take a look -- excuse me?

4 (Co-counsel confer off the record.)

5 **BY MR. KIEVE:**

6 **Q.** Did anybody at NetSuite ever complain about your hunting
7 trips or your fishing trips or your leadership retreats?

8 **A.** No. I believe Ms. Ray covered that. No, they did not.

9 **Q.** Okay. Could we take a look at Exhibit 201, please. This
10 is a discussion of -- could we blow it up just a bit so the
11 jury can get the context. Just the first part.

12 This is talking about YESpay and MPC. What is -- or MPS.
13 What is MPS?

14 **A.** That was the Mercury payment systems.

15 **Q.** Okay. Ms. Ray asked you some questions about MPS versus
16 YESpay. Did you go live with Mercury Processing System?

17 **A.** We integrated Mercury Processing, or we were being told it
18 was integrated. When we went live, it did not function.

19 **Q.** Okay. Can we take a look at 147, please. This is the
20 change order.

21 When was it signed, if you can recall? Go to the last
22 page. Maybe it's not the change order. It just refers to it.

23 Do you recall when this change order was signed?

24 **A.** I don't believe it was signed until later in the fall that
25 year. September or October, as I recall from the documents.

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1 **Q.** I think we covered this in our direct examination, but let
2 me reframe it in light of the cross-examination.

3 Did this delay the implementation from the NetSuite
4 perspective?

5 **A.** Absolutely not.

6 **Q.** Okay. Who caused the delay, as far as you were concerned?

7 **A.** NetSuite was unprepared to go live for our projected
8 initial September or October Go-Live dates. It was pushed to
9 January by the NetSuite team, and it was further pushed to
10 March after that. So a delay in August of 2014 had no impact
11 on that.

12 **Q.** Did NetSuite ever tell you that Grouse River did not have
13 adequate staffing to be able to do the implementation?

14 **A.** They never said that.

15 **Q.** Okay. Let's take a look at TX151, please. This is a list
16 of employees who left with statements for why they left.

17 **A.** That's correct.

18 **Q.** Okay. Can we go to the period of 2014 to 2015.

19 **THE COURT:** I think there's --

20 **BY MR. KIEVE:**

21 **Q.** Okay. Without going into the detail of this, can you tell
22 me why employees were leaving in 2014, 2015, 2016, and 2017?

23 **A.** I believe there was an extreme increase in demoralizing
24 circumstances after that NetSuite project went live, and the
25 effort that had been put forth, as I said earlier, over the

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1 prior year, to result in a downturn in our business after going
2 live, it was extremely stressful for our entire team.

3 **Q.** We looked at TX7, the last page of the business review
4 document, requirements document, and we had some discussion
5 about data migration. And Ms. Ray asked you if this was solely
6 Grouse River's responsibility.

7 **A.** Yes, she did.

8 **Q.** Do you recall that testimony?

9 **A.** Yes, I do.

10 **Q.** Were you able to migrate the accounting data?

11 **A.** Yes, we were.

12 **Q.** And what happened when you put it on the NetSuite
13 platform?

14 **A.** The accounting platform, as far as the migration, was
15 historical data, not the data that was essential to our
16 day-to-day operations.

17 **Q.** And what happened when you switched over to the NetSuite
18 system in terms of your accounting? Did that work or not?

19 **A.** The accounting functions, for the most part, were
20 functional.

21 **Q.** Okay. Was the migration done?

22 **A.** Yes, it was.

23 **Q.** Okay. Ms. Ray showed you TX156, and this is a -- can we
24 have the date on that, please? May 13, 2016.

25 Why did you reach out to Grant Thornton on May 13, 2016?

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1 **A.** We had had the departure of Stacie, as we discussed, and
2 were looking at potentially bringing him in to finalize some of
3 the historical data migration. And we ended up hiring a
4 different gentleman inside the organization.

5 **Q.** Okay. Could we take a look at the March proposal that
6 I think is attached there.

7 **THE COURT:** No, no. It's okay. A little bit of a
8 delay. He's on it.

9 **MS. RAY:** He wants you to go to the presentation
10 that's attached to this e-mail. Thanks, John.

11 **BY MR. KIEVE:**

12 **Q.** This is entitled "Enterprise Resource Planning
13 Implementation Assistance."

14 Did Grant Thornton subsequently provide you with a report?

15 **A.** We did. We contracted them a year later when we were
16 still having challenges on the platform.

17 **Q.** Okay. And you testified they did give you a report?

18 **A.** They did.

19 **Q.** Okay. Can we look at TX116, please. Can we blow that up.

20 There was a reference in there about not doing a final
21 inventory count before you went live. Can we find that? Is
22 that the wrong number?

23 **MS. RAY:** I mean --

24 **THE COURT:** What's the exhibit number?

25 **MR. KIEVE:** 116.

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1 **THE COURT:** 116.

2 **MS. RAY:** There needs to be someone to direct John
3 where to go on the evidence, if that's what you want. Do you
4 want me to go tell him where to go?

5 **MR. KIEVE:** That's not the one I want.

6 **THE COURT:** So what's the question?

7 **BY MR. KIEVE:**

8 **Q.** I'll ask this: Why didn't you do a full inventory count
9 before Go-Live?

10 **A.** We were going to change our inventory counting system from
11 an annual count into an ongoing cycle counting system on the
12 NetSuite platform.

13 **MR. KIEVE:** Your Honor, I see it's 3 o'clock.

14 **THE COURT:** No. We're going till 3:30. We took a
15 whole 13-minute break. So we're going to be able to finish.

16 **MR. KIEVE:** Okay.

17 **THE COURT:** You didn't have to take the five minutes.
18 We're going to get through this witness, come what may, and
19 then, at least we'll be through.

20 **MR. KIEVE:** Guess what? I'm going to get them out
21 sooner.

22 **THE COURT:** Okay. Good. All right, yeah. The five
23 turned into 13, and that's enough to get us an extra half hour.

24 **BY MR. KIEVE:**

25 **Q.** Did the inventory count have any effect on the lack of

1 inventory visibility?

2 **A.** No, it did not.

3 **Q.** And where did the lack of inventory visibility come from?

4 **A.** The transactions from the point-of-sale system were not
5 synchronizing to the ERP system and were not deducting from our
6 inventory.

7 **Q.** And who caused that?

8 **A.** That was entirely on the NetSuite platform.

9 **Q.** You retained Mr. Szczepko. Is that his name?

10 **A.** Szczepko, I believe is the pronunciation.

11 **Q.** Szczepko. He referred to image handling. Did image
12 handling have any effect upon the speed of the NetSuite server?

13 **MS. RAY:** Objection.

14 **THE WITNESS:** It has no impact on the speed of the
15 NetSuite server, no.

16 **BY MR. KIEVE:**

17 **Q.** Did it have anything to do with the server issues at all?

18 **A.** It can't have an impact on the server. The server is
19 entirely within NetSuite's control.

20 **Q.** Can we take a look at the Szczepko report, which is
21 Exhibit Number 152.

22 Why did you hire Mr. Szczepko?

23 **A.** We were having an extensive array of challenges on the
24 e-commerce platform that we went live with from NetSuite, and
25 we brought him in to try and identify issues with the platform

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1 and overall improve our e-commerce shopping experience.

2 **Q.** Could we please turn to page 16.

3 There's a reference at the bottom of the page to social
4 media, and then there's a reference to SEO. What is that?

5 **A.** Search engine optimization.

6 **Q.** And what does that do?

7 **A.** Search engine optimization is the idea of anything that
8 ties in that assists your site in ranking with a search engine,
9 to help promote it.

10 **Q.** Was that a function that the NetSuite system was supposed
11 to supply?

12 **A.** NetSuite was supposed to integrate the system to Google
13 Analytics and Google Tracking and ensure that the pages were
14 SEO optimized, correct.

15 **Q.** And did that happen?

16 **A.** No, it did not.

17 **Q.** What effect did that have on your business?

18 **A.** It impacted the visibility of our website to external
19 shoppers and decreased the amount of free marketing that we got
20 from the site, essentially.

21 **Q.** Okay. There's also reference in this page to conversion.

22 Do you see that?

23 **A.** Yes, I do.

24 **Q.** What is that referring to?

25 **A.** Conversion refers to the amount of traffic across the site

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1 and the amount of that traffic that actually purchases.

2 **Q.** And did the NetSuite system have an impact on that?

3 **A.** It had a massive impact on our conversion.

4 **Q.** And is this what Mr. Szczepko is referring to?

5 **A.** That's correct.

6 **Q.** Okay. Under this is the statement:

7 "Marketing effectiveness is reduced by conversion
8 problems -- Log-in and Checkout need to be fixed."

9 What does that refer to?

10 **A.** It was referring to those issues that I demonstrated
11 earlier through the videos where customers could not log in or
12 check out through the website.

13 **Q.** He writes:

14 "Conversion rate down from last year despite similar
15 traffic."

16 Was he an expert in this field?

17 **A.** He was knowledgeable in this field, yes.

18 **Q.** Okay. And what does that refer to?

19 **A.** Exactly as it says, that we're maintaining similar traffic
20 numbers but that less people were buying product on the new
21 site.

22 **Q.** Let's turn to the next page, page 17, please. It says:

23 "Conversion for Grouse River is weak. While overall
24 conversion is a product of many factors noted here, there
25 are specific near-term changes that can be made to improve

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1 the situation. Log-in."

2 Tell me what this is all about.

3 **A.** The NetSuite platform, as configured, when we went live,
4 had a customer log-in feature. The accounts would not let
5 customers log in quite often. If you had a customer account,
6 it would tell you that your password didn't work. If you said
7 you needed to reset the password, it would tell you you don't
8 have that e-mail address. It was incredibly confusing from a
9 customer experience.

10 His recommendation was potentially going to a guest or a
11 one-page checkout. We eventually did adopt that. That was the
12 Innoday Consulting that we talked about earlier today. It
13 didn't impact the conversion in a major way because of the
14 other site issues.

15 **Q.** And then there's a reference here also to "checkout." Do
16 you see that?

17 **A.** Yes, I do.

18 **Q.** He writes:

19 "Grouse River experiences a higher rate of checkout
20 abandonment. From May 1 to July 28, 2,828 exits
21 (61 percent of views) have occurred at a
22 'checkout/billing.' We're losing too many potential
23 customers here for this not to be considered top priority.
24 More than that, the confirmation page (last step in
25 checkout) offers no fewer than 6 links other than 'Place

1 Order,' two of which leave the checkout process
2 completely."

3 What does this tell you?

4 A. This is exactly the issue that was presented on the video
5 where the checkout billing page would quite often end up at a
6 blank slate and the customer could not progress through
7 checkout and would leave.

8 **MR. KIEVE:** I think the jury can go home.

9 **THE COURT:** All right. So this witness is excused
10 then?

11 **MR. KIEVE:** Yes.

12 **THE COURT:** All right. Mr. Fallis, you actually are
13 excused --

14 **THE WITNESS:** Thank you.

15 **THE COURT:** -- from testifying.

16 (Witness excused.)

17 **THE COURT:** All right. So that's a wrap, folks. And
18 thank you very much for your tolerance of the hiccupy day. We
19 will all -- right, team? -- do our very best to deliver a
20 seamless experience tomorrow. We'll be back here at 8:15.
21 Right? So we can start at 8:30 sharp.

22 I'll ask you to remember the admonition. No independent
23 research. No talking with each other or anyone else about the
24 case. And with that, I will wish you a good rest of your
25 afternoon. And, again, apologies for the hiccups, but it's all

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1 okay, and we'll have a good day tomorrow. I'll see you then.

2 **MR. KIEVE:** Thank you again, Your Honor.

3 **THE COURT:** All right.

4 (Proceedings adjourned at 3:06 p.m.)

5 ---oo---

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7 **CERTIFICATE OF REPORTERS**

8 I certify that the foregoing is a correct transcript
9 from the record of proceedings in the above-entitled matter.

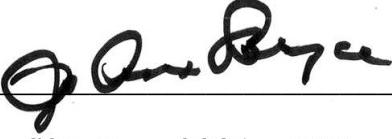
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11 DATE: Wednesday, July 10, 2019

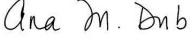
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17 U.S. Court Reporter

18

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